(17,436.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 322.

ANTHONY F. SEEBERGER, JULIUS S. GRINNELL, SIMEON D. BUSEY, ET AL., PLAINTIFFS IN ERROR,

vs.

LEANDER J. McCORMICK.

IN ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

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a UNITED STATES OF AMERICA, ss:

The President of the United States of America to the honorable the judges of the supreme court of the State of Illinois, Greeting:

[Seal of the Supreme Court of the United States.]

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between Anthony F. Seeberger, Julius S. Grinnell, Simeon D. Busey, Conway H. Hillman, Charles G. Blanden, Arthur M. Barnhart, John Cudahy, Charles E. Simon, David A. Kohn, George B. Reeve, and Henry S. Boutell, plaintiffs in error, and Leander J. McCormick, defendant in error, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States and the decision was in favor of such their validity, or wherein was drawn in ques-
b tion the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said plaintiffs in error, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 10th day of May, in the year of our Lord one thousand eight hundred and ninety-nine.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—

HENRY B. BROWN,
Associate Justice of the Supreme Court of the United States.

c In the Supreme Court of Illinois.

ANTHONY F. SEEBERGER, JULIUS S. GRINNELL, Simeon D. Busey, Conway H. Hillman, Charles G. Blanden, Arthur M. Barnhart, John Cudahy, Charles E. Simon, David A. Kohn, George B. Reeve, and Henry S. Boutell

vs.

LEANDER J. McCORMICK.

Error to Appellate Court, First District.

I, Christopher Mamer, clerk of the supreme court, do hereby certify that on the 13th day of May, in the year of our Lord one thousand eight hundred and ninety-nine, a copy of the foregoing writ of error for the defendant in error was lodged in my office, at Springfield, Illinois.

Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.

Witness my hand and the seal of said court this 13th day of May, A. D. 1899.

CHRISTOPHER MAMER,
Clerk of Supreme Court.

[10 cent U. S. internal-revenue stamp, canceled May 13, 1899. C. M.]

d UNITED STATES OF AMERICA, *ss:*

To Leander J. McCormick, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Illinois, wherein Anthony F. Seeberger, Julius S. Grinnell, Simeon D. Busey, Conway H. Hillman, Charles G. Blanden, Arthur M. Barnhart, John Cudahy, Charles E. Simon, David A. Kohn, George B. Reeve, and Henry S. Boutell are plaintiffs in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiffs in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Henry B. Brown, associate justice of the Supreme Court of the United States, this 10th day of May, in the year of our Lord one thousand eight hundred and ninety-nine.

HENRY B. BROWN,
Associate Justice of the Supreme Court of the United States.

e Service of the within citation accepted this 12th day of May, A. D. 1899.

A. M. PENCE,
Att'y for L. J. McCormick, Def't in Error.

f In the Supreme Court of Illinois.

ANTHONY F. SEEBERGER, JULIUS S. GRINNELL, Simeon D. Busey, Conway H. Hillman, Charles G. Blanden, Arthur M. Barnhart, John Cudahy, Charles E. Simon, David A. Kohn, George B. Reeve, and Henry S. Boutell

vs.

LEANDER J. MCCORMICK.

Error to Appellate Court, First District.

I, Christopher Mamer, clerk of the supreme court, do hereby certify that on the 13th day of May, in the year of our Lord one thousand eight hundred and ninety nine, a copy of the foregoing citation and acceptance of service was lodged in my office, at Springfield, Illinois.

Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.

Witness my hand and the seal of said court this 13th day of May, A. D. 1899.

CHRISTOPHER MAMER,
Clerk of Supreme Court.

[Ten-cent U. S. internal-revenue stamp, canceled May 13, 1899. C. M.]

g In the Supreme Court of Illinois.

ANTHONY F. SEEBERGER, JULIUS S. GRINNELL, Simeon D. Busey, Conway H. Hillman, Charles G. Blanden, Arthur M. Barnhart, John Cudahy, Charles E. Simon, David A. Kohn, George B. Reeve, Henry S. Boutell

vs.

LEANDER J. MCCORMICK.

Error to Appellate Court, First District.

I, Christopher Mamer, clerk of the supreme court of Illinois, elected for the northern grand division, and keeper of the records and files thereof, by virtue of the foregoing writ of error and in obedience thereto do certify that the following pages, numbered from one (1) to one hundred and twenty-eight (128), inclusive, contain a true and complete transcript and copy of the record and proceedings had in said court in the case which is above entitled and of the whole thereof, including the opinion of the court, as the same remain of record and on file in my said office.

In testimony whereof I have hereunto set my hand and caused the seal of said supreme court of Illinois to be hereunto affixed, at Springfield, this thirteenth day of May, in the year of our Lord one thousand eight hundred and ninety-nine.

Seal of the Supreme Court, State of Illinois, Aug. 23, 1818.

CHRISTOPHER MAMER,
Clerk of Supreme Court.

[Ten-cent U. S. internal-revenue stamp, canceled May 13, 1899. C. M.]

1 At a supreme court begun and held at Springfield, on Tuesday, the fifth day of April, in the year of our Lord one thousand eight hundred and ninety-eight, within and for the State of Illinois.

Present: Jesse J. Phillips, chief justice; Alfred M. Craig, justice; Benjamin D. Magruder, justice; Jacob W. Wilkin, justice; Joseph N. Carter, justice; James H. Cartwright, justice; Carroll C. Boggs, justice; Edward C. Akin, attorney general; Edward A. Baxter, sheriff.

Attest: CHRISTOPHER MAMER, *Clerk.*

Be it remembered, to wit, on the fourth day of April, A. D. 1898, there was filed in the office of the clerk of the said court a certain transcript of the record of the superior court of Cook county and of the appellate court of Illinois, first district; which said transcripts are in the words and figures following, viz:

2 UNITED STATES OF AMERICA.

STATE OF ILLINOIS, } ss:
County of Cook, }

Pleas before the Honorable John Barton Payne, one of the judges of the superior court of Cook county, in the State of Illinois, holding a branch court of said court, at a regular term of said superior court of Cook county, begun and holden at the court-house, in the city of Chicago, in said county and State, on the first Monday, being the fifth day, of April, in the year of our Lord one thousand eight hundred and ninety-seven, and of the Independence of the United States of America the one hundred and twenty-first.

Present: The Honorable John Barton Payne, judge of the superior court of Cook county; Charles S. Deneen, State's attorney; James Pease, sheriff of Cook county.

Attest: JOHN A. LINN, *Clerk.*

3 Be it remembered that heretofore, to wit, on the nineteenth day of November, in the year of our Lord one thousand eight hundred and ninety-five, there was filed in the office of the clerk of the superior court of Cook county a certain præcipe for summons; which is in the words and figures as follows, to wit:

STATE OF ILLINOIS, } ss:
County of Cook, }

In the Superior Court of Cook County, December Term, A. D. 1895.

LEANDER J. McCORMICK, Plaintiff, *vs.* ANTHONY F. SEEBERGER, WILLIAM COX, Julius S. Grinnell, Chas. H. Ferguson, Simeon H. Busey, Arthur M. Barnhart, Conway W. Hillman, John Cudahy, Charles G. Blanden, Charles E. Simons, Seneca D. Kimbark, Charles D. Seeberger, David A. Kohn, Seymour Walton, George R. Reeve, and Henry S. Bautell, Defendants.	Assumpsit. Damages, $35,000.00.

4 The clerk of said court will issue a summons in the above-entitled cause to said defendants in a plea of trespass upon the case upon promises, to the damage of said plaintiff in the sum of thirty-five thousand (35,000) dollars, direct the same to the sheriff of Cook county to execute, and make it returnable to the December term of said court, A. D. 1895.

PENCE & CARPENTER,
Plaintiff's Attorneys.

Chicago, November 19th, 1895.

To Stephen D. Griffin, Esq., clerk.

And afterwards, to wit, on the same day and year last aforesaid, there issued out of the office of the clerk of said court the people's writ of summons; which said writ, with the sheriff's return thereon endorsed, is in the words and figures as follows, to wit:

STATE OF ILLINOIS, } ss:
Cook County, }

The People of the State of Illinois to the sheriff of said county, Greeting:

5 We command you that you summon Anthony F. Seeberger, William Cox, Julius S. Grinnell, Charles H. Ferguson, Simeon H. Busey, Arthur M. Barnhart, Conway W. Hillman, John Cudahy, Charles G. Blanden, Charles E. Simons, Seneca D. Kimbark, Charles D. Seeberger, David A. Kohn, Seymour Walton, George B. Reeve, and Henry S. Boutell, if they shall be found in your county, personally to be and to appear before the superior court of Cook county, on the first day of the term thereof, to be holden at the court-house, in the city of Chicago, in said Cook county, on the first Monday of December next, to answer unto Leander J. McCormick in a plea of trespass on the case upon promises, to the damage of said plaintiff, as it is said, in the sum of thirty-five thousand dollars.

And have you then and there this writ, with an endorsement thereon in what manner you shall have executed the same.

6 Witness Stephen B. Griffin, clerk of our said court, and the seal thereof, at Chicago aforesaid, this 19th day of November, A. D. 1895.

[SEAL.] STEPHEN D. GRIFFIN, *Clerk.*

P'd, 1.00.

Served this writ on the within-named defendant, Anthony F. Seeberger, by delivering a copy thereof to him this 20th day of November, 1895.

Other within-named defendants not found in my county.

JAMES PEASE, *Sheriff,*
By W. H. JENKINS, *Deputy.*

And afterwards, to wit, on the 21st day of November, A. D. 1895, there was filed in the office of the clerk of said court a certain declaration, which is in the words and figures as follows, to wit:

STATE OF ILLINOIS, } ss:
County of Cook, }

In the Superior Court of Cook County.

7 LEANDER J. McCORMICK
vs.
ANTHONY F. SEEBERGER, WILLIAM COX, JULIUS S. GRINNELL, Charles H. Ferguson, Simeon H. Busey, Conway W. Hillman, Charles G. Bladen, Charles D. Seeberger, Arthur M. Barnhart, John Cudahy, Charles E. Simons, Seneca D. Kimbark, David A. Kohn, George Reeve, and Henry S. Boutell.

Leander J. McCormick, plaintiff in this suit, by Pence & Carpenter, his attorneys, complains of Anthony F. Seeberger, William Cox, Julius S. Grinnell, Charles H. Ferguson, Simeon H. Busey, Conway W. Hillman, Charles G. Bladen, Charles D. Seeberger, Arthur M. Barnhart, John Cudahy, Charles E. Simons, Seneca D. Kimbark, David A. Kohn, George B. Reeve, and Henry S. Boutell, copartners, doing business in Chicago, Illinois, under the firm name and style of the Market National Bank of Chicago, defendants in this suit, summoned, etc., of a plea of trespass on the case upon promeses:

8 For that whereas on, to wit, the 9th day of February, A. D. 1893, in said county of Cook, by a certain indenture then and there made between said plaintiff, of the one part, and the said defendants, of the other part, and bearing date of that day, the plaintiff did demise and lease unto said defendants certain rooms and offices in the first story of the building known as the Major block, located on the southeast corner of Madison and La Salle streets, in the city of Chicago, in said county, and more particularly described as the offices at that time occupied by the Hide & Leather

bank and the firm of R. S. Critchell & Co.; to have and to hold the same to said defendants, to be occupied by them as a banking office, from, to wit, May 1st, A. D. 1893, to April 30th, A. D. 1898, with the privelege, however, to either party to cancel said lease by giving ninety (90) days' prior notice in writing to the other party of the desire to terminate said lease on May 1st, A. D. 1895.

And the plaintiff avers that it was further stipulated in
9 and by said lease that said defendant- should pay said plaintiff a yearly rent of thirteen thousand ($13,000) dollars, payable in equal installments of one thousand and eighty-three and $\frac{33}{100}$ (1,083.33) dollars in gold or its equivalent monthly, on the first day of each and every month during and for said term, at the office of said plaintiff or in such other place in the city of Chicago, in said county, as plaintiff may direct.

And the plaintiff further avers that it was further stipulated in and by said lease that no charge should be made by said plamtiff for rent until said defendant should take possession of said premises.

And plaintiff avers that said indenture was duly executed by both said plaintiff and said defendants and was duly delivered by said defendants to said plaintiff.

And plaintiff avers also that in consideration of said demise and lease of the premises in said indenture contained, to be performed by said plaintiff, the said defendants undertook and promised to perform the same and all the conditions therein contained,
10 and, amongst other things, they undertook and promises that they, the said defendants, would well and truly pay or cause to be paid to said plaintiff the said yearly rent or sum of thirteen thousand (13,000) dollars per annum at the several days and times and places and in the installments aforesaid.

And said plaintiff further avers that on, to wit, June 22nd, A. D. 1893, said defendants entered upon and took possession of said premises and paid said plaintiff the rent for said premises to and including July 22nd, A. D. 1893; that afterwards, to wit, on or about August 1st, A. D. 1893, said defendants informed said plaintiff that they would not any longer be bound by or perform said contract or lease on their part, and they did then and there renounce said contract and thenceforth refused to treat it as subsisting and binding upon them, and announced to said plaintiff that they would not pay the next month's rent and they would not pay the rent falling due during any of the months during the term of said lease as they fell due or at any other time, and said defendants did then and there repudiate said contract or lease in all its parts and abandoned the same and neglected and refused to per-
11 form the same and refused without any reasonable or just cause to be bound by the same.

And plaintiff avers that he has always held fast to said contract and has always refused to treat the same as cancelled or abrogated in any way, and he has always insisted upon the performance thereof by said defendant according to its terms, and that the rent should be paid thereon in accordance with its terms, and that he

has always been ready, able, and willing to perform the same on his part and to furnish the possession of said premises unto said defendants without molestation, and has offered to perform said lease or contract and to perform all the obligations and duties required of him according to the terms thereof.

And plaintiff further avers that in accordance with the terms of said lease plaintiff did, on, to wit, January 28th, A. D. 1895, give notice in writing to said defendants of plaintiff's desire to cancel said lease on May 1st, A. D. 1895.

Yet said plaintiff avers that said defendants have never paid him any rent on account of said lease since the month of May,
12 A. D. 1893, and that there is now due to him on account of such non-performance of said contract or lease and on account of the total breach thereof, as aforesaid, and on account of the rent part due, with interest thereon, a large sum of money, to wit, thirty-five thousand ($35,000) dollars, and that the defendants have refused and do refuse to pay the same, and that by reason of such repudiation and non-performance the plaintiff avers that he has suffered great loss and damage:

For that whereas the said defendants also heretofore, to wit, on the first (1st) day of June, in the year of our Lord one thousand eight hundred and ninety-five, at Chicago, to wit, at the county aforesaid, became and still are indebted to the said plaintiff in the sum of thirty-five thousand (35,000) dollars of lawful money of the United States of America, for divers goods, wares, and merchandise by the said plaintiff before that time sold and delivered to the said defendants and at the special instance and request of the said defendants, and, being so indebted to the said plaintiff, the said defendants, in
13 consideration thereof, afterwards, to wit, on the same day and year and at the place aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the sum of money last mentioned when the said defendants should thereunto afterwards — requested.

And whereas also the said defendants afterwards, to wit, on the same day and year, at the place aforesaid, in consideration that the said plaintiff had before that time, at the like special instance and request of the said defendants, sold and delivered to the said defendants divers other goods, wares, and merchandise of the said plaintiff, the said defendants then and there undertook and faithfully promised the said plaintiff that the said defendants would well and truly pay to the said plaintiff so much money as the last aforesaid goods, wares, and merchandise at the time of the sale and delivery thereof were reasonably worth when the said defendants should be thereunto afterwards requested; and the said plaintiff avers that the said goods, wares, and merchandise last mentioned at the time of the sale and delivery thereof were reasonably worth the further sum of thirty-five thousand (35,000) dollars of like lawful
14 money, as aforesaid, to wit, at the place aforesaid, whereof the said defendants afterwards, on the same day and year and at the place aforesaid, had notice.

And whereas also the said defendants afterwards, to wit, on the

same day and year and at the place aforesaid, were indebted to the said plaintiff in the further sum of thirty-five thousand (35,000) dollars of like lawful money, as aforesaid, for money before that time lent and advanced by the said plaintiff to the said defendants and at the like request of the said defendants, and in the like sum of other money by the said plaintiff before that time paid, laid out, and expended for the said defendants and at the like request of the said defendants, and in the like sum for other money by the said defendants before that time had an- received to and for the use of the said plaintiff, and in the like sum for other money before that time and then due and owing the said plaintiff for interest upon and for the forbearance of divers other sums of money before that time and then due and owing from said defendants to said plaintiff,
and in a like sum for the use and occupation of certain lands
15 and tenements of said plaintiff by the said defendants and
at their special instance and request, and in the like sum for the price and value of work then done and material for the same provided by the said plaintiff for the said defendants and at the like special request of the said defendants; and, being so indebted, the said defendants, in consideration thereof, afterwards, to wit, on the same day and year and at the place aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the several sums of money in this count mentioned when the said defendants should be thereunto afterwards requested.

And whereas also the said defendants afterwards, to wit, on the day and year last aforesaid and at the place last aforesaid, accounted together with the said plaintiff of and concerning divers other sums of money before that time due and owing from the said defendants to said plaintiff and then and there being in arrear and unpaid, and upon such accounting the said defendants then and there were found to be in arrear and indebted to the said plaintiff in the further
sum of thirty-five thousand (35,000) dollars, of like lawful
16 money, as aforesaid; and, being so found in arrear and in-
debted to the said plaintiff, the said defendant-, in consideration thereof, afterwards, to wit, on the day and year last aforesaid and at the place last aforesaid, undertook and then and there faithfully promised the said plaintiff well and truly to pay unto the said plaintiff the sum of money last mentioned when the said defendants should be thereunto afterwards requested;

Nevertheless the said defendants (although often requested, etc.) have not yet been paid the said several sums of money above mentioned, or any or either of them or any part thereof, to the said plaintiff, but to pay the same or any part thereof to the said plaintiff have hitherto altogether refused and still do refuse, to the damage of the said plaintiff of a large sum of money.

That, although plaintiff has kept and performed all things in said contract contained on his part to be kept and performed, the defendants have not performed said contract or lease or paid the various

sums of money above mentioned and refuse so to do, to the
17 damage to said plaintiff of thirty-five thousand (35,000) dollars; and therefore he brings suit, etc.

PENCE & CARPENTER,
Attorneys for Plaintiff.

Copy of Instrument Sued upon.

This is to certify that I, Leander J. McCormick, of the city of Chicago, county of Cook and State of Illinois, have demised and leased, and do hereby demise and lease, unto the Market National Bank of Chicago the offices now occupied by the Hide and Leather bank and Mess. R. S. Critchell & Co., not including office No. 4, on the first story of the building known as the Major block, situated on the S. E. corner of Madison ans La Salle streets, in the city of Chicago, State of Illinois, to be used and occupied by said Market national bank as a banking office, for the term of five years from the 1st day of May, 1893, to the 30th day of April, 1898, at the yearly rent of thirteen thousand $\frac{00}{100}$ (13,000) dollars, payable in equal installments of one thousand eighty-three $\frac{33}{100}$ (1,083.33)
18 dollars (in gold or its equivalent) monthly, on the last day of each and every month during and for the said term, at the office of Leander J. McCormick, in Chicago, or such other place in Chicago as the lessor may direct.

And it is a condition of this letting that the said lessee shall not assign this lease agreement, nor let or underlet said rooms or any part thereof, nor use the same or permit the same to be used for any other purpose than as above described, nor make any alteration therein without written consent of the lessor first had and obtained, and shall remain upon and be surrendered with the premises as a part thereof at the termination of this lease; and, further, that all personal property in the demised premises shall be at the risk of lessee only, and lessor shall not be liable for any damage to said personal property, to said premises, or to said lessee arising from bursting of water or steam pipes, or from any acts or neglect of cotenants or other occupants of the building or any other persons, and that the rules and regulations in regard to the said building which are printed on the other side hereof shall during the continu-
19 ance of this agreement be in all things observed and performed by the said lessee and his clerks and servants, and shall constitute and form a part of this lease.

It is also agreed that the lessee shall be furnished free of charge with heat from 8 a. m. until 6 p. m., Sundays and legal holidays excepted, from October 1st until May 1st from the apparatus for heating in the building, and it is understood and agreed that if, during the continuance of this agreement, the said premises shall be so injured by fire as to be rendered untenantable, then, in case such injury shall not be repaired by the lessor within thirty days thereafter, it shall be optional with either party hereto to cancel this agreement, and in case of any such cancellation the rent shall be

paid to the day of such fire, and no rent shall be collectable while the rooms are untenable.

In witness whereof I have hereunto set my hand and seal this 9th day of February, one thousand eight hundred and ninety-three.

——— ———.

Sealed and delivered in the presence of—
LEANDER J. McCORMICK,
By J. H. McC. [SEAL.]

20 This is to certify that we, The Market National Bank of Chicago, have hired and taken from Leander J. McCormick the rooms referred to in the foregoing instrument, at the rent and upon the other terms and conditions therein mentioned and set forth, and we hereby agree with said Leander J. McCormack to make punctual payments of the said rents as provided in the said instrument, and to do, observe, and perform in all things the conditions and agreements therein set forth to be observed and performed by us, and if default be made in the payment of rent or of any part thereof by us, such default shall of itself constitute a forfeiture of said lease and a forcible detainer, and in case of such default or of a default in the performance of any of said conditions and agreements or either of them, said Leander J. McCormick or his agent may re-enter the said premises and remove all persons therefrom, forcibly or otherwise, and all damages arising from so doing are hereby waived, and we hereby expressly waive any demand for such rent so in default or for the possession of said premises or of notice of any intention to re enter prescribed by any statute or law
21 whatever, but re-entry may be made or suit in forcible detainer, ejectment, or otherwise for possession of said premises may be maintained in consequence of any such default without any demand or notice prescribed by any statute or law whatever.

Said lessor shall have the right to alter and to improve or repair said building in which said room or rooms are located at any time, and he or his agent or employés shall have the right to enter said room or rooms at all reasonable hours to examine the same or to make such repairs, additions, or alterations as may be necessary for the safety, improvement, or preservation thereof or of said building, and we hereby release said Leander J. McCormick from all claims for damages caused in the past or that may be caused in the future by any alterations to said building or room or rooms, and we hereby consent that said Leander J. McCormick or his agent may exhibit the said premises and put and keep upon the doors or windows thereof a notice "For rent" at any time within three months before the expiration of this lease.

22 Witness our hands and seals this 9th day of February, 1893.

MARKET NATIONAL BANK, [SEAL.]
Per A. F. SEEBERGER, *President.* [SEAL.]

Attest: "WILLIAM COX, *Cashier.*"

Sealed and delivered in the presence of—
"MARK M. FOOTE."

Guarantee.

In consideration that the above-written lease was executed and delivered to the above-named lessee at request, and in further consideration of one dollar by — received of the above-named lessor, — hereby guarantee to the said lessor, his heirs and assigns, the performance by the said lessee, — executors, administrators, and assigns, of all the agreements and covenants in the said lease contained by the said lessee, — executors, administrators, and assigns, to be kept and performed.

—— —, 189–.

—— ——. [SEAL.]

23 *Rules and Regulations Referred to within.*

1. The entries, passages, stairways, and elevators shall not be obstructed by any of the tenants or used by them for any other purpose than ingress and egress to and from their respective rooms. No bulky article shall be carried up or down the building except on the elevator, and then at such hours as the janitor may appoint.

2. ——.

3. The water-closets and other water fixtures shall not be used for any purpose than those for which they were constructed, and any damage resulting to them from misuse or the defacing or injury of any part of the building shall be borne by the tenant who shall occasion it.

4. The light through the transoms opening into the halls shall not be obstructed by the lessee.

5. No tenant, his clerks or servants, shall use said rooms for sleeping purposes or disturb the other tenants by the use of any musical instruments, any unseemly noises, or by any interference in any way. Dogs or other animals shall not be allowed in the building.

24 6. No dust, rubbish, or litter shall be swept from any room into any of the halls except under the directions of the janitor, nor shall the same nor anything else be thrown or emptied from any of the windows of said building.

7. All tenants and occupants must observe strict care not to leave their windows open when it rains or snows, and for any default or carelessness in this respect shall make good all injury sustained by other tenants and to the owner for damage to the paint, plastering, or other parts of the building resulting from such default or carelessness.

8. ——.

9. ——.

10. All necessary keys will be furnished by lessor, to be returned by lessee *to* end of lease. Lessee will not have any duplicate keys made.

11. If lessee desires awnings or shades at the windows, to be erected at the lessee's expense, they must be of such uniform shape,

color, material, and make as may be prescribed by the agent of the building.

12. ——.

25 13. Furniture and packages required to be taken up in the elevator must be first unpacked in the room designated for that purpose by the janitor and carried through the building at such hours as the janitor may appoint.

14. No additional locks shall be placed upon any door of the building without the written consent of the lessor, first obtained and endorsed upon this lease.

15. The rent of an office will include occupancy of office, water in standing bowls, steam heat, and elevator service from 8 a. m. to 6 p. m., Sundays and legal holidays excepted, but lessor shall not be liable for any damage from the stoppage of the steam apparatus or elevator for necessary or desirable repairs of improvements.

16. The lessor reserves the right to enter upon any premises vacated by the lessee before the termination of lease to make repairs or alterations.

17. The lessor reserves the right to make such other and further reasonable rules and regulations as in his judgment may from time to time be needful for the safety, care, and cleanliness of the premises and for the preservation of good order therein.

CHICAGO, —— —, 189–.

26 Received of Leander J. McCormick — keys, being a complete set of keys to the premises referred to in the within lease.

—— ——.
—— ——.

And afterwards, to wit, on the 3rd day of December, A. D. 1895, there was filed in the office of the clerk of said court certain pleas, which are in the words and figures as follows, to wit:

STATE OF ILLINOIS, } *ss.*
Cook County, }

Superior Court Thereof, December Term, A. D. 1895.

ANTHONY F. SEEBERGER, Impleaded with WILLIAM Cox, Julius S. Grinnell, Charles H. Ferguson, Simeon H. Busey, Conway W. Hillman, Charles G. Blanden, Charles D. Seeberger, Seymour Walton, Arthur M. Barnhart, John Cudahy, Charles E. Simons, Seneca D. Kimbark, David A. Kohn, George B. Reeve, and Henry S. Boutell, *ats.* LEANDER J. MCCORMICK.	Assumpsit.

27 And this defendant, Anthony F. Seeberger, by Duncan & Gilbert, his attorneys, comes and defends the wrong and in-

jury, when, etc., and says that he did not undertake or promise in manner and form as the plaintiff has above thereof complained against him; and of this he puts himself upon the country, etc.

And, for a further plea in this behalf, the said defendant, Anthony F. Seeberger, says that the plaintiff ought not to have his aforesaid action against him, the said Anthony F. Seeberger, because he says that he is not, nor ever was, jointly liable with the said William Cox, Juli-s S. Grinnell, Charles H. Ferguson, Simeon H. Busey, Conway W. Hillman, Charles G. Blanden, Charles D. Seeberger, Seymour Walton, Arthur M. Barnhart, John Cudahy, Charles E. Simons, Seneca D. Kimbark, David A. Kohn, George B. Reeve, and Henry S. Boutell in respect of the several supposed causes of action in the said declaration mentioned, or any or either of them, in manner and form as the plaintiff has above in that behalf alleged; and of this the said defendant, Anthony F. Seeberger, put- himself upon the country, etc.

DUNCAN & GILBERT,
Defendants' Attorneys.

28 STATE OF ILLINOIS, } ss:
Cook County, }

Anthony F. Seeberger, the above-named defendant, being duly sworn, on his oath deposes and says that the foregoing second plea is true in substance and in fact.

ANTHONY F. SEEBERGER.

Subscribed and sworn to before me this 2nd day of December, A. D. 1895.

[NOTARY SEAL.] MATE B. BREWSTER,
Notary Public.

And afterwards, to wit, on the 10th day of July, A. D. 1896, there was filed in the office of the clerk of said court a certain amended declaration, which is in the words and figures as follows, to wit:

STATE OF ILLINOIS, } ss:
County of Cook, }

In the Superior Court of Cook County.

LEANDER J. MCCORMICK }
vs.
ANTHONY F. SEEBERGER. }

29 Now comes said plaintiff, by Pence & Carpenter, his attorneys, and, by leave of the court for that purpose first had and obtained, hereby amends the declaration in said cause by striking out the name of Seymour Walton wherever it appears in said declaration.

PENCE & CARPENTER,
Plaintiff's Attorneys.

And afterwards, to wit, on the 16th day of July, A. D. 1896, being one of the days of the July term of the superior court, the following, among other, proceedings were had and entered of record in said court, to wit:

LEANDER J. McCORMICK
vs.
ANTHONY F. SEEBERGER. } Assumpsit.

On motion of plaintiff's attorney, it is ordered that all papers and proceedings in said cause be, and are hereby, amended by discontinuing as to the defendant Seymour Walton without costs, and leave given the defendant, Anthony F. Seeberger, to withdraw his plae filed in said cause on the third day of December, A. D.
30 1895, and to file a new plea herein instanter.

And afterwards, to wit, on the 16th day of July, A. D. 1896, there was filed in the office of the clerk of said court certain pleas, which are in the words and figures as follows, to wit:

STATE OF ILLINOIS, } ss:
Cook County, }

Superior Court Thereof, July Term, A. D. 1896.

ANTHONY F. SEEBERGER, JULIUS S. GRINNELL, SIMEON H. Busey, Conway H. Hillman, Charles G. Blanden, Arthur M. Barnhart, John Cudahy, Charles E. Simons, David A. Kohn, George B. Reeve, and Henry Boutell, Impleaded with William Cox, Charles H. Ferguson, Charles D. Seeberger, and Seneca D. Kimbark,
als.
LEANDER J. McCORMICK. } Assumpsit.

And the defendants, Anthony F. Seeberger, Julius S. Grinnell, Simeon H. Busey, Conway W. Hillman, Charles G. Blanden,
31 Arthur M. Barnhart, John Cudahy, Charles E. Simons, David H. Kohn, George B. Reeve, and Henry S. Boutell, by Duncan & Gilbert, their attorneys, come and defend the wrong and injury, when, etc., and say that they did not undertake or promise in manner or form as the plaintiff has above thereof complained against them; and of this they put themselves upon the country, etc.

And for a further plea in this behalf the said defendants, Anthony F. Seeberger, Julius S. Grinnell, Simeon H. Busey, Conway W. Hillman, Charles G. Blanden, Arthur M. Barnhart, John Cudahy, Charles E. Simons, David A. Kohn, George B. Reeve, and Henry S. Boutell, say that the plaintiff ought not to have his aforesaid action against them, because they say that they are not nor ever were jointly liable with the said William Cox, Charles H. Ferguson, Charles D. Seeberger, and Seneca D. Kimbark or with each other in respect of the several supposed causes of action in the declaration

mentioned or any or either of them in manner or form as the plaintiff has above in that behalf alleged; and of this the said defendants, Anthony F. Seeberger, Julius S. Grinnell, Simeon H. Busey, Conway W. Hillman, Charles G. Blanden, Arthur M. Barn-
32 hart, John Cudahy, Charles E. Simons, David A. Kohn, George B. Reeve, and Henry S. Boutell, put themselves upon the country, etc.

DUNCAN & GILBERT,
Defendants' Attorneys.

STATE OF ILLINOIS, } ss:
Cook County, }

Anthony F. Seeberger, one of the above-named defendants, being duly sworn, on his oath deposes and says that the foregoing second plea is true in substance and in fact.

ANTHONY F. SEEBERGER.

Subscribed and sworn to before me this 6th day of July, A. D. 1896.

[NOTARY SEAL.] MATE B. BREWSTER,
Notary Public.

And afterwards, to wit, on the 1st day of May, A. D., 1897, being one of the days of the April term of the superior court, the following, among other, proceedings were had and entered of record in said court, to wit:

33 LEANDER J. McCORMICK
vs.
ANTHONY F. SEEBERGER, WILLIAM COX, JULIUS S. Grinnell, Charles H. Ferguson, Simeon H. Busey, Arthur M. Barnhart, Conway W. Hillman, John Cudahy, Charles E. Simons, Seneca D. Kimbark, Charles D. Seeberger, David A. Kohn, George B. Reeve, and Henry S. Boutell. } Assumpsit.

On the agreement of the parties to this suit, now here made in open court, this cause is submitted to the court for trial without a jury, and the court now hereafter hearing all the evidence adduced — the arguments of counsel, and, being fully advised in the premises, finds the issues for the defendants; to which the plaintiff excepts.

Therefore it is considered by the court that the defendants do have and recover of and from the plaintiff their costs and charges in this behalf expended and have execution therefor; whereupon the plaintiff, having entered his exceptions herein, prays an appeal from the judgment of this court to the appellate court in and
34 for the first district of Illinois, which is allowed on filing his personal bond in the sum of two hundred and fifty dollars, within thirty days from this date, and leave given said plaintiff to file his bill of exceptions within thirty days from this date.

And afterwards, to wit, on the 13th day of May, A. D. 1897, there was filed in the office of the clerk of said court a certain bill of exceptions, which is in the words and figures as follows, to wit:

STATE OF ILLINOIS, } ss.
County of Cook, }

In the Superior Court of Cook County, May Term, A. D. 1897.

LEANDER J. MCCORMICK
vs.
ANTHONY F. SEEBERGER, WILLIAM COX, JULIUS S. GRINNELL, Charles H. Ferguson, Simeon H. Busey, Conway W. Hillman, Charles G. Blanden, Charles D. Seeberger, Arthur M. Barnhart, John Cudahy, Charles E. Simons, Seneca D. Kimbark, David A. Kohn, Geo. B. Reeve, and Henry S. Boutell. } Gen'l No. 170,441.

35 Be it remembered that on the trial of the above-entitled cause before the court without a jury, a trial by jury having been waived by agreement of the parties, the plaintiff, to maintain the issues on his part, read in evidence a stipulation in the words and figures following, to wit:

STATE OF ILLINOIS, } ss.
County of Cook, }

In the Superior Court of Cook County.

LEANDER J. MCCORMICK
vs.
ANTHONY F. SEEBERGER ET AL. } Assumpsit.

1st. It is hereby stipulated and agreed by and between the parties to the above-entitled cause that a trial by jury in said cause shall be waived and said cause submitted to the court for trial upon the following facts, which, for the purposes of said trial, are to be taken as true: On the 31st day of January, A. D. 1893, Anthony F. Seeberger, Julius S. Grinnell, Charles H. Ferguson, Simeon H. Busey, Conway W. Hillman, William Cox, Charles G. Blanden, Charles D. Seeberger and Seymour Walton, for the purpose of forming a national banking association under the laws of the United States, entered into articles of association, which said articles were duly forwarded by them to the Comptroller of the Currency of the United States, and were by him duly filed in his office on the 3d day of February, A. D. 1893, and were and are in the words and figures following, to wit:

36 "Articles of association for the purpose of organizing an association to carry on the business of banking under the laws of the United States. The undersigned subscribers for the stock of the association hereinafter named do enter into the following articles of association:

First. The name and title of this association shall be 'The Market National Bank of Chicago, Illinois.'

Second. The place where its banking-house or office shall be located and its operations of discount and deposit carried on, and its general business conducted, shall be Chicago, Cook county, Illinois.

Third. The board of directors shall consist of fifteen shareholders and the following persons: Anthony F. Seeberger, Julius S. Grinnell, Charles H. Ferguson, Conway W. Hillman, George B. Reeve, Arthur M. Barnhart, John Cudahy, Charles E. Simmons, Seneca D. Kimbark, David A. Kohn, Simeon H. Busey, Henry S. Boutell, William Cox, Charles D. Seeberger, and Charles G. Blanden, having been duly elected directors of this association to hold their offices as such until the regular annual election takes place, pursuant to the fourth article of these articles of association, and until their successors are chosen and have qualified.

Fourth. The regular annual meetings of the shareholders for the election of directors shall be held at the banking-house of this association on the second Tuesday of January of each year: but if no election shall be held on that day, may be held on any other day according to the provisions of section 5149 of the Revised Statutes of the United States, and all elections shall be held according to such regulations as may be prescribed by the board of directors not inconsistent with the provisions of the national banking law and of these articles.

37 Fifth. The capital stock of this association shall be one million dollars, to be divided into shares of one hundred dollars each; but the capital may, with the approval of the Comptroller of the Currency, be increased at any time by shareholders owning two-thirds of the stock, according to the provisions of an act of Congress approved May 1, 1886; and in case of the increase of the capital of the association each shareholder shall have the privilege of subscribing for such numbers of shares of the proposed increase of the capital stock as he may be entitled to according to the number of shares owned by him before the stock is increased.

Sixth. The board of directors, a majority of whom shall be a quorum to do business, shall elect one of its members president of this association who shall hold his office (unless he shall be disqualified or be sooner removed by a two-thirds vote of all the members of the board) for the term for which he was elected a director.

The directors shall have power to elect a vice-president, who shall also be a member of the board of directors, and who shall be authorized, in the absence or inability of the president from any cause to perform all acts and duties pertaining to the office of president, except such as the president only is authorized by law to perform, and to elect or appoint a cashier and such other officers and clerks as may be required to transact the business of the association; to fix the salaries to be paid to them, and continue them in office or to dismiss them as, in the opinion of a majority of the board the interests of the association may demand.

The directors shall have power to define the duties of the officers

and clerks of the association, to require bonds from them,
38 and to fix the penalty thereof; to regulate the manner in which elections of directors shall be held; and to appoint judges of the elections; to make all by-laws that may be proper for them to make not inconsistent with law, for the general regulation of the business of the association and the management of its affairs, and generally to do and perform all acts that it may be legal for a board of directors to do and perform under the Revised Statutes aforesaid.

Seventh. This association shall continue for the period of twenty years from the date of the execution of its organization certificate, unless sooner placed in voluntary liquidation by the act of its shareholders owning at least two-thirds of its stock, or otherwise dissolved by authority of law.

Eighth. These articles of association may be changed or amended at any time by shareholders owning a majority of the stock of the association, in any manner not inconsistent with law; and the board of directors, or any three shareholders, may call a meeting of the shareholders for this or any other purpose, not inconsistent with law, by publishing notice thereof for thirty days in a newspaper published in the town, city or county where the bank is located, or by mailing to each shareholder notice in writing thirty days before the time fixed for the meeting.

In witness whereof we have hereunto set our hands this thirty-first day of January, eighteen hundred and ninety-three.

1. ANTHONY F. SEEBERGER, *Chicago, Illinois.*
2. JULIUS S. GRINNELL, do.
3. CHARLES H. FERGUSON, do.
4. SIMEON H. BUSEY, *Urbana, Ill.*
5. CONWAY W. HILLMAN, *Chicago, Ill.*
6. WILLIAM COX, " "
7. CHARLES G. BLANDEN, " "
8. CHARLES D. SEEBERGER, " "
9. SEYMOUR WALTON, " " "

39 I certify that the articles of association of the Market National Bank of Chicago are executed in duplicate; that one of the instruments so executed is the foregoing, and that the other, in all respects like the foregoing, is on file with said bank.

(Signed) WILLIAM COX, *Cashier.*

Chicago, January 31st, 1893.

On the same day said Anthony F. Seeberger, Julius S. Grinnell, Charles H. Ferguson, Simeon H. Busey, Conway W. Hillman, William Cox, Charles G. Blanden, Charles D. Seeberger and Seymour Walton did, under their hands, make an organization certificate, which said certificate was on the same day duly acknowledged before a notary public, and was, together with the acknowledgment thereof, authenticated by the seal of said notary, transmitted to the Comptroller of the Currency of the United States, who received the same on the 3d day of February, A. D. 1893, and duly recorded

and carefully preserved the same in his office on said 3d day of February, A. D. 1893, which said certificate was and is in the words and figures following, to wit:

Organization Certificate.

"We, the undersigned, whose names are specified in article fourth of this certificate, having associated ourselves for the purpose of organizing an association for carrying on the business of banking under the laws of the United States, do make and execute the following organization certificate:

First. The name of the association shall be "the Market National Bank of Chicago."

Second. The said association shall be located in the city of Chicago, county of Cook and State of Illinois, where its operations of discount and deposit are to be carried on.

Third. The capital stock of this association shall be one million dollars ($1,000,000), and the same shall be divided into ten thousand shares of one hundred dollars each.

Fourth. The name and residence of each of the shareholders of this association, with the number of shares held by each, are as follows:

Name.	Residence.	No. of shares.
1. Anthony F. Seeberger	Chicago, Ill.	250
2. Julius S. Grinnell	" "	20
3. Simeon H. Busey	Urbana, Ill.	100
4. Charles H. Ferguson	Chicago, Ill.	250
5. Conway W. Hillman	" "	200
6. William Cox	" "	25
7. Charles G. Blanden	" "	9,095
8. Charles D. Seeberger	" "	10
9. Seymour Walton	" "	50
Total		10,000

Fifth. This certificate is made in order that we may avail ourselves of the advantages of the aforesaid laws of the United States.

In witness whereof, we have hereunto set our hands this thirty-first day of January, 1893.

1. ANTHONY F. SEEBERGER.
2. JULIUS S. GRINNELL.
3. SIMEON H. BUSEY.
4. CHARLES H. FERGUSON.
5. CONWAY W. HILLMAN.
6. WILLIAM COX.
7. CHARLES G. BLANDEN.
8. CHARLES D. SEEBERGER.
9. SEYMOUR WALTON.

41 STATE OF ILLINOIS, }
County of Cook, } ss:

On this, the thirty-first day of January, A. D. 1893, before me, a notary public of Cook county, and State of Illinois, personally came Anthony F. Seeberger, Julius S. Grinnell, Simeon H. Busey, Charles H. Ferguson, Conway W. Hillman, William Cox, Charles G. Blanden, Charles D. Seeberger and Seymour Walton, to me well known, who severally acknowledged that they executed the foregoing certificate for the purposes therein mentioned.

Witness my hand and seal of office, thirty-first of January, and year aforesaid.

(Signed) JOHN KIDSTON,
[SEAL OF NOTARY.] *Notary Public.*

2nd. At a meeting of the directors of said Market national bank, chosen by the shareholders thereof, and named in said articles of association, which said meeting was held on the 31st day of January, A. D. 1893, said A. F. Seeberger was duly elected president of said bank and William Cox was duly elected cashier thereof.

3rd. On the 9th day of February, A. D. 1893, the said A. F. Seeberger, in the name of said Market national bank and as president thereof, in pursuance of a resolution of the board of directors of said Market national bank, purporting by its terms to authorize him so to do, entered into a lease in writing with said Leander J. McCormick of certain premises to be used as a banking-room and place of business by said Market national bank, which said lease with certain papers attached thereto were and are in the words and figures following, to wit:

42 This is to certify, that I, Leander J. McCormick, of the city of Chicago, county of Cook and State of Illinois, have demised and leased and do hereby demise and lease unto the Market National Bank of Chicago, the offices now occupied by the Hide and Leather bank and Messrs. R. S. Critchell & Co., not including office No. 4, on the first story of the building known as the Major block, situated on the S. E. corner of Madison and La Salle streets, in the city of Chicago, State of Illinois, to be used and occupied by said Market national bank as a banking office, and for no other purpose, for the term of five years from the 1st day of May, 1893, to the 30th day of April, 1898, at the yearly rent of thirteen thousand $\frac{00}{100}$ ($13,000) dollars, payable in equal installments of one thousand, eighty-three $\frac{33}{100}$ (1,083.33) dollars (in gold or its equivalent) monthly on the last day of each and every month during and for the said term, at the office of Leander J. McCormick, in Chicago, or such other place in Chicago as the lessor may direct.

And it is a condition of this letting, that the said lessee shall not assign this lease agreement, nor let nor underlet said rooms, or any part thereof, nor use the same or permit the same to be used for any other purpose than as above described, nor make any alterations therein without written consent of the lessor first had and obtained, and shall remain upon and be surrendered with the premises

as a part thereof at the termination of this lease; and further, that all personal property in the demised premises shall be at risk of lessee only, and lessor shall not be liable for any damage to said personal property, to said premises or to said lessee, arising from bursting of water or steam pipes, or from any acts or neglect
43 of cotenants or other occupants of the building or any other persons, and that the rules and regulations in regard to said building which are printed on the other side hereof, shall during the continuance of this agreement, be in all things observed and performed by the said lessee and his clerks and servants, and shall constitute and form a part of this lease.

It is also agreed that the lessee shall be furnished free of charge with heat from 8 a. m. until 6 p. m., Sundays and legal holidays excepted, from October 1st until May 1st, from the apparatus for heating in the building, and it is understood and agreed that if, during the continuance of this agreement, the said premises shall be so injured by fire as to be rendered untenantable, then in case such injury shall not be repaired by the lessor within thirty days thereafter, it shall be optional with either party to cancel this agreement, and in case of any such cancellation, the rent shall be paid to the day of such fire, and no rent shall be collectible while the rooms are untenantable.

In witness whereof, I have hereunto set my hand and seal this 9th day of February, one thousand eight hundred and ninety-three.

(Signed) LEANDER J. McCORMICK, [SEAL.]
By R. H. McC.

Sealed and delivered in the presence of—
—— ——.

This is to certify, that we, the Market National Bank of Chicago, have hired and taken from Leander J. McCormick, the room referred to in the foregoing instrument, at the rent and upon the other terms and conditions therein mentioned and set forth; and we hereby
44 agree with said Leander J. McCormick to make punctual payments of the said rent as provided in the said instrument, and to do, observe and perform in all things the conditions and agreements therein set forth to be observed and performed by us, and if default be made in the payment of rent or of any part thereof by us such default shall of itself constitute a forfeiture of said lease and a forcible detainer, and in case of such default or of a default in the performance of any of said conditions and agreements, or either of them, said Leander J. McCormick or his agent may re-enter the said premises and remove all persons therefrom forcibly or otherwise, and all damages arising from so doing are hereby waived, and we hereby expressly waive any demand for such rent so in default or for the possession of said premises, or of notice of any intention to re-enter, prescribed by any statute or law whatever, but re-entry may be made, or suit in forcible detainer, ejectment or otherwise for possession of said premises may be maintained in consequence of

any such default without any demand or notice prescribed by any statute or law whatever.

Said lessor shall have the right to alter, add to, improve or repair said building in which said room or rooms are located at any time, and he or his agent or employés shall have the right to enter said room or rooms at all reasonable hours to examine the same, or to make such repairs, additions or alterations as may be necessary for the safety, improvement or preservation thereof, or of said building, and we hereby release said Leander J. McCormick from all claims for damages caused in the past or that may be caused in the future by any alterations to said building or room or rooms. And
45 we hereby consent that said Leander J. McCormick or his agent may exhibit the said premises, and put and keep upon the doors or windows thereof a notice "For rent" at any time within three months before the expiration of this lease.

Witness our hands and seals this 9th day of February, 1893.

MARKET NATIONAL BANK, [SEAL.]
Per A. F. SEEBERGER, *President.* [SEAL.]

Sealed and delivered in presence of—
MARK M. FOOTE.

[Market National Bank Seal, Chicago, Ill.]

Attest: WILLIAM COX, *Cashier.*

Guarantee.

In consideration that the above-written lease was executed and delivered to the above-named lessee at — request, and in further consideration of one dollar by — received of the above-named lessor — hereby guarantee to the said lessor, his heirs and assigns, the performance by the said lessee — executors, administrators and assigns, of all the agreements and covenants in the said lease contained by the said lessee, — executors, administrators and assigns to be kept and performed.

—— —, 189–.

—— ——. [SEAL.]

46 *Assignment and Acceptance.*

For value received, — hereby assign all — right, title and interest in and to the within lease unto —— heirs and assigns, and in consideration of the consent to this assignment by the lessor, — guarantee the performance by said —— —— of all the covenants on the part of the second party in said lease mentioned.

In consideration of the above assignment and written consent of the party of the first part thereto — hereby assume and agree to make all the payments and perform all the covenants and conditions of the within lease, by said party of the second part to be made and performed.

Witness — hand- and seal- this — day of ——, A. D. 189–.

—— ——. [SEAL.]
—— ——. [SEAL.]
—— ——. [SEAL.]

Consent to Assignment.

— hereby consent to the assignment of the within lease to —— —— on the express condition, however, that the assignor shall remain liable for the prompt payment of the rent and performance of the covenants on the part of the second party as herein mentioned, and that no further assignment of said lease or subletting of the premises, or any part thereof, shall be made without — written assent first had thereto.

Witness — hand and seal this — day of ——, A. D. 189–.

—— ——. [SEAL.]

47 *Rules and Regulations Referred to within.*

1. The entries, passages, stairways, and elevators shall not be obstructed by any of the tenants, or used by them for any other purpose than ingress and egress to and from their respective rooms. No bulky articles shall be carried up or down the building except on the elevator, and then at such hours as the janitor may appoint.

2. ——.

3. The water-closets and other water fixtures shall not be used for any purpose other than those for which they were constructed, and any damage resulting to them from misuse, or the defacing or injury of any part of the building shall be borne by the tenant who shall occasion it.

4. The light through the transoms opening into the halls shall not be obstructed by the lessee.

5. No tenant, his clerks or servants, shall use said rooms for sleeping purposes or disturb the other tenants by the use of any musical instruments, any unseemly noises, by any interference in any way. Dogs or other animals shall not be allowed in the building.

6. No dust, rubbish or litter shall be swept from any room into any of the halls, except under the directions of the janitor; nor shall the same nor anything else be thrown or emptied from any of the windows of said building.

7. All tenants and occupants must observe strict care not to leave their windows open when it rains or snows; and for any default or carelessness in this respect shall make good all injury sustained by other tenants, and to the owner for damage to the paint, plastering or other parts of the building resulting from such default or carelessness.

48 8. ——.

9. ——.

10. All necessary keys will be furnished by lessor, to be returned by lessee at end of lease. Lessee will not have any duplicate keys made.

11. If lessee desires awnings or shades at the windows, to be erected at lessee's expense, they must be of such uniform shape, color, material and make as may be prescribed by the agent of the building.

12. ——.

13. Furniture and packages required to be taken up in the elevator must be first unpacked in the room designated for that purpose by the janitor, and carried through the building at such hours as the janitor may appoint.

14. No additional locks shall be placed upon any doors of the building without the written consent of the lessor first obtained and endorsed upon this lease.

15. The rent of an office will include occupancy of office, water in standing bowls, steam heat and elevator service from 8 a. m. to 6 p. m., Sundays and legal holidays excepted, but lessor shall not be liable for any damages from the stoppage of the steam apparatus or elevator for necessary or desirable repairs or improvements.

16. The lessor reserves the right to enter upon any premises vacated by the lessee before the termination of lease, to make repairs or alterations.

17. The lessor reserves the right to make such other and further reasonable rules and regulations as in his judgment may from time to time be needful for the safety, care and cleanliness of the premises, and for the preservation of good order therein.

49 CHICAGO, —— —, 189-.

Received from Leander J. McCormick — keys, being a complete set of keys to the premises referred to in the within lease.

—— ——.

(Endorsement:) Lease. Major building. Lessee, the Market National Bank of Chicago. Banking office. From May 1st, 1893, to April 30th, 1898. Yearly rental, $13,000; monthly rental, $1,083.33.

The following was attached to said lease:
Leander J. McCormick, 84 La Salle St., Chicago.

In connection with the lease hereto attached it is further understood and agreed:

That the lessor, Leander J. McCormick, shall make the following alterations and repairs at his expense, to wit:

New plate-glass window to be put in at the corner entrance, all windows to be replaced with large lights of plate glass with transom over each, a large window or entrance to be put in at the head of the main stairs. Interior of bank office to be painted or grained in imitation of oak, and room is to be papered in good style, new
50 hard-wood floor to be put down in the working portion of bank and white marble or other tile to be put down for floor in public portion of the office.

Steam radiators to be put in where needed, and neat combination gas and electric fixtures and wiring to be put in where required. Exterior of building to be painted before July 1, 1893. No charge for steam heat, but electric light and gas to be paid for by the bank. Space just east of the east vault is to be made into a good water-closet for bank employés.

And it is further understood and agreed that both landlord and tenant can cancel this lease by either party giving ninety (90) days' prior notice in writing to the other of desiring termination of said lease on May 1st of 1895, 1896 or 1897. The lessee shall have the privilege of subletting the Critchell office, if they so desire, subject to the other conditions of the lease. No charge for rent to be made until lessee takes possession of the premises.

MARKET NATIONAL BANK, [SEAL.]
Per A. F. SEEBERGER, *President.* [SEAL.]

LEANDER J. McCORMICK,
By R. H. Mc. C.

{ Market National Bank, Chicago, Illinois, }
{ Chicago, February 9th, 1893. }

51 The following was attached to said lease:

TREASURER'S OFFICE OF THE
WORLD'S COLUMBIAN EXPOSITION.

A. F. Seeberger, treasurer, room 458, No. 160 Adams St.

CHICAGO, *April 12th*, 1893.

Leander J. McCormick, Esq., 84 La Salle St., city.

DEAR SIR: Referring to your communication of even date, regarding the changes to be made in the vaults in the banking-rooms known as the "Hide & Leather bank" and the Critchell & Company's offices immediately adjoining said banking-room on the south, and which the Market national bank have rented from you under lease dated February 9th, 1893, would say that the conditions therein contained are hereby accepted and will be attached to the lease executed by you to the Market national bank.

Yours, respectfully, MARKET NATIONAL BANK,
By A. F. SEEBERGER, *President.*

The following was attached to said lease:

Leander J. McCormick, 84 La Salle St., Chicago.

The Market national bank, Chicago, Ill.

GENTLEMEN: Recognizing the fact that it is difficult for you to divide up your office in a suitable manner, I wish to suggest that the west two vaults heretofore used by the Hide & Leather
52 bank and Critchell & Co., and the partition wall between the two offices be entirely removed on the first story, and a new vault be arranged in the small south office heretofore occupied by Critchell & Co., and known as room # 4. The new vault referred to is to be constructed by bricking up with cement all openings in room # 4, and a new twelve-inch wall to be built inside of said room, leaving a four-inch air space between the present wall and the one to be erected. The ceiling and floor of vault to be used by the bank is to be constructed with "I" beams and brick arch. In order to

show my liberality in the premises, I will hereby agree to make the proposed changes provided you will pay one-half the cost of said changes. I will make no charge for the office until such changes are completed.

Yours truly,

LEANDER J. McCORMICK,
By R. HALL McCORMICK.

We propose to do the above work for $2,475.

ANGUS & GINDELE.

4th. Subsequently calls were made by the board of directors of said Market national bank upon the shareholders thereof for payments on account of their subscriptions to the said capital stock. A portion of the said shareholders never paid any portion of their subscriptions, while others paid a portion of the amount called for, and others paid the entire amount due upon their subscriptions. Of the entire capital stock of $1,000,000 provided for in said articles of association no more than the sum of $331,594 was ever paid in.

5th. On the 22d day of June, A. D. 1893, the said president and cashier of said Market National Bank of Chicago, in the name of said Market National Bank of Chicago, took possession of
53 the premises demised and leased to it under said lease hereinbefore mentioned, the said premises not having been until that time ready for occupancy, and the possession thereof having, until then, been retained by said Leander J. McCormick with the full consent and approval of the officers of said bank for the purpose of putting said demised premises in a condition suitable for the occupation and use of said Market National Bank of Chicago, which the said Leander J. McCormick did do in manner provided in said lease, and the said cashier of said Market National Bank of Chicago on said day paid to said Leander J. McCormick the rent accruing under said lease down to the 22d day of July, A. D. 1893.

6th. Said Market National Bank of Chicago never was authorized by the Comptroller of the Currency to commence the business of banking, and never did commence the business of banking.

7th. The said Leander J. McCormick at the time of the negotiations prior to the execution of said lease and at the time of the execution of said lease, and at the time when said officers of said Market National Bank of Chicago took possession of the demised premises on the 22d day of June, A. D. 1893, understood and believed that said Market National Bank of Chicago was duly and legally organized as a national bank, and that as such it was ready to do a banking business, and that it had the power to enter into said lease and the agreements connected therewith, and had no knowledge or information to the contrary until the 15th day of August, A. D. 1893, at which time the officers of the said Market National Bank of Chicago informed said McCormick that said Market National Bank of Chicago had no power to enter into
54 said lease and offered to surrender to said McCormick said demised premises and said lease, and the said McCormick was then and there informed by the said officers of said Market

National Bank of Chicago that said Market National Bank of Chicago had never been authorized by the Comptroller of the Currency to commence the business of banking, but nevertheless said McCormick then and there refused to accept such surrender.

8th. After the execution of said lease it was agreed by and between the officers of said Market National Bank of Chicago and said Leander J. McCormick in pursuance of a resolution of the board of directors of said Market National Bank of Chicago purporting by its terms to authorize the same, that the said Market National Bank of Chicago would pay one-half of the cost of changing the offices and building the vault, &c., in said demised premises; and thereafter said premises were changed in accordance with said agreement by said Leander J. McCormick at a cost of $2,475, which was paid by him and no part of which was ever repaid to him by said Market National Bank of Chicago, said agreement having been entered into and said changes having been made prior to the 22d day of June, A. D. 1893.

9th. Prior to the execution of said lease officers of said Market National Bank of Chicago were elected by its board of directors who also caused a seal to be made for said bank. The name of said bank was signed to said lease by its president and its corporate seal was attached thereto. The officers of said Market National Bank of Chicago from time to time signing themselves in their official capacity corresponded with said Leander J. McCormick, using in such correspondence letter-heads or stationery with the name
55 of the Market national bank, its location and place of business and the name of its officers printed thereon, and said letters were signed either by the president or by the cashier of said bank.

10th. The officers of said Market National Bank of Chicago after having taken possession of the premises demised and leased to it and during the month of June, A. D. 1893, put into said premises the necessary fixtures and furniture required to carry on a banking business, and also a quantity of blank books and stationery suitable for use in carrying on a banking business, which said fixtures, furniture, blank books and stationery so placed in said premises were not removed therefrom until the 30th day of April, A. D. 1895.

11th. On the 20th day of September, A. D. 1893, the said A. F. Seeberger caused to be left with R. Hall McCormick, the duly authorized agent of said Leander J. McCormick, the key to said banking office, by throwing the same upon the desk of said R. Hall McCormick, or upon the desk of some one in his presence, but the said R. Hall McCormick at that time refused to accept the same, or to accept the surrender of said lease. Said key was, however, left by said Seeberger in the office of said R. Hall McCormick.

12th. On the 4th day of October, A. D. 1893, an agreement was entered into in pursuance of which said Leander J. McCormick ever since said date has had, and retained possession of said premises mentioned in said lease, which said agreement was and is in the words and figures following, to wit:

This agreement, made this fourth day of October, A. D. 1893, by and between the Market National Bank of Chicago, Illinois,
56 party of the first part, and Leander J. McCormick, of Chicago, Illinois, party of the second part, witnesseth—that:

Whereas, a controversy exists between said parties in reference to the liability of said first party for rent of the offices in the Major block, formerly occupied by the Hide and Leather bank and Messrs. R. S. Critchell & Co. (not including office No. 4), at the southeast corner of Madison and La Salle streets, in Chicago, Illinois, under a certain instrument dated February 9, 1893, and purporting to be a lease executed by said parties, and

Whereas, it is the desire of both of said parties pending the settlement of said controversy, either by suit or otherwise, that said offices should not remain vacant, and the rent thereof be wholly lost:

Now, therefore, in consideration thereof, it is agreed by and between the parties that said party of the second part shall take possession of said offices and use his best endeavors to lease the same on such terms as may be satisfactory to both parties, and collect the rent thereof, and that such taking possession and leasing of said offices shall not, nor shall anything herein contained, prejudice either of said parties in respect to said controversy, nor in any manner affect the rights of either party, excepting that in case said party of the second part shall ultimately establish a right to hold said party of the first part liable for the rent of said offices, the amount of rent provided for by any lease that may be made by said party of the second part in pursuance of this agreement shall be applied to reduce *pro tanto* such liability of said party of the first part.

In witness whereof, said party of the second part has here-
57 unto set his hand, and said party of the first part has caused its name to be signed by its president the day and year first above written.

MARKET NATIONAL BANK,
By A. F. SEEBERGER, *President.*
LEANDER J. McCORMICK.

We, the undersigned, a committee appointed at a meeting of the directors of the Market national bank, held July 22, 1893, to settle the outstanding indebtedness of said Market national bank, do hereby, in our own behalf as well as in behalf of all other persons interested therein approve of the foregoing agreement this fourth day of October, A. D. 1893. This approval, however, is not to be construed, used or taken as any acknowledgment of our liability upon said lease in said agreement mentioned.

A. F. SEEBERGER.
A. M. BARNHART.

I assent to the foregoing and agree that I will not use the same to create any liability against said Seeberger and Barnhart or either of them, that would not exist had they not signed their name thereto.

LEANDER J. McCORMICK.

That said Leander J. McCormick made every effort to rent and obtain a tenant for said premises, pursuant to the above agreement, and was unable so to rent them or obtain a tenant for them.

13th. On the 15th day of August, A. D. 1893, said Leander J. McCormick was duly notified by said A. F. Seeberger of the abandonment of all further proceedings with respect to the carrying on by said Market National Bank of Chicago of a banking business,
58 and that said Market National Bank of Chicago would not occupy the said premises demised in said lease, and that he, said Leander J. McCormick, was at liberty at any time to take possession of said premises, but nevertheless, ever since said date and down to the first day of May, A. D. 1895, said Leander J. McCormick has refused to accept a surrender of said lease and said Market National Bank of Chicago has refused to occupy the demised premises thereunder or to pay the rent provided for in said lease, and accruing subsequent to July 22, 1893, and said demised premises thereafter remained vacant and unoccupied until October 4, A. D. 1893, when they were taken possession of by said Leander J. McCormick in pursuance of the agreement of October 4, A. D. 1893, hereinbefore mentioned.

14th. On the 15th day of July, A. D. 1893, the said Anthony F. Seeberger, Julius S. Grinnell, Charles H. Ferguson, Simeon H. Busey, Conway W. Hillman, William Cox, Charles G. Blanden, Charles D. Seeberger and Seymour Walton, executed and signed a certificate revoking the above-mentioned articles of association and organization certificate and transmitted the same to the Comptroller of the Currency, who received and placed the same on file in his office.

15th. On the same day Anthony F. Seeberger, William Cox, Conway W. Hillman, Arthur M. Barnhart, George W. Reeve, Charles H. Ferguson, Julius S. Grinnell, Henry S. Boutell, John Cudahy, David A. Kohn, John A. Sweet and De Forest Skinner, for the purpose of forming a national banking association under the laws of the United States, entered into articles of association, which said articles were duly forwarded to the Comptroller of the
59 Currency of the United States, and were by him filed in his office on the 18th day of July, A. D. 1893, and were and are in the words and figures following, to wit:

Articles of Association.

For the purpose of organizing an association to carry on the business of banking, under the laws of the United States, the undersigned subscribers for the stock of the association hereinafter named do enter into the following articles of association:

First. The name and title of this association shall be "The Market National Bank of Chicago, Illinois."

Second. The place where its banking-house or office shall be located, and its operations of discount and deposit carried on, and its general business conducted, shall be *Chicago, Cook county, Illinois.*

Third. The board of directors shall consist of not less than nine nor more than twenty-one shareholders. And the following persons, Anthony F. Seeberger, Julius S. Grinnell, Charles H. Ferguson, Conway W. Hillman, George B. Reeve, Arthur M. Barnhart, John Cudahy, David A. Kohn, Simeon H. Busey, Henry S. Boutell, John A. Sweet and De Forest Skinner, have been duly elected directors of this association, to hold their offices as such until the regular annual election takes place, pursuant to the fourth articles of these articles of association, and until their successors are chosen and have qualified.

Fourth. The regular annual meetings of the shareholders for the election of directors shall be held at the banking-house of this association on the second Tuesday of January of each year. But if no election shall be held on that day, it may be held on any
60 other day, according to the provisions of section 149 of the Revised Statutes, and all elections shall be held according to such regulations as may be prescribed by the board of directors, not inconsistent with the provisions of the national banking law and of these articles.

Fifth. The capital stock of this association shall be five hundred thousand dollars, to be divided into shares of one hundred dollars each; but the capital may, with the approval of the Comptroller of the Currency, be increased at any time by shareholders owning two-thirds of the stock, according to the provisions of an act of Congress approved May 1, 1886; and in case of the increase of the capital of the association, each shareholder shall have the privilege of subscribing for such number of shares of the proposed increase of the capital stock as he may be entitled to according to the number of shares owned by him before the stock is increased.

Sixth. The board of directors, a majority of whom shall be a quorum to do business, shall elect one of their members president of this association, who shall hold his office (unless he shall be disqualified, or be sooner removed by a two-thirds vote of all the members of the board) for the term for which he was elected a director. The directors shall have power to elect a vice-president, who shall also be a member of the board of directors, and who shall be authorized, in the absence or inability of the president, from any cause, to perform all acts and duties pertaining to the office of president, except such as the president only is authorized by law to perform, and to elect or appoint a cashier, and such other officers and clerks as may be required to transact the business of the association; to fix the salaries to be paid to them, and continue
61 them in office, or to dismiss them as, in the opinion of a majority of the board, the interests of the association may demand.

The directors shall have power to define the duties of the officers and clerks of the association, to require bonds from them, and to fix the penalty thereof; to regulate the manner in which elections of directors shall be held, and to appoint judges of the elections; to make all by-laws that it may be proper for them to make not inconsistent with law, for the general regulation of the business of

the association and the management of its affairs, and generally to do and perform all acts that it may be legal for a board of directors to do and perform under the Revised Statutes aforesaid.

Seventh. This association shall continue for the period of twenty years from the date of the execution of its organization certificate, unless sooner placed in voluntary liquidation by the act of its shareholders owning at least two-thirds of its stock, or otherwise dissolved by authority of law.

Eighth. These articles of association may be changed or amended at any time by shareholders owning a majority of the stock of the association, in any manner not inconsistent with law; and the board of directors, or any three shareholders, may call a meeting of the shareholders for this or any other purpose, not inconsistent with law, by publishing a notice thereof for thirty days in a newspaper published in the town, city or county where the bank is located, or by mailing to each shareholder notice in writing thirty days before the time fixed for the meeting.

In witness whereof we have hereunto set our hands this — day of ——, eighteen hundred and ninety- —.

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1. ANTHONY F. SEEBERGER, *Chicago, Illinois.*
2. WILLIAM COX, " "
3. CONWAY W. HILLMAN, " "
4. ARTHUR M. BARNHART, " "
5. GEO. B. REEVE, " "
6. CHAS. H. FERGUSON, " "
7. JULIUS S. GRINNELL, " "
8. HENRY S. BOUTELL, " "
9. JOHN CUDAHY, " "
10. DAVID A. KOHN, " "
11. JOHN A. SWEET, " "
12. DE FOREST SKINNER, *Valparaiso, Indiana.*
13. (Mr. Busey to sign.)

I certify that the articles of association of the Market National Bank of Chicago, Ill., are executed in duplicate; that one of the instruments so executed is the foregoing, and that the other, in all respects like the foregoing, is on file with said bank.

July fifteenth, 1893.

(Signed) WILLIAM COX, *Cashier.*

16th. On the 15th day of July, A. D. 1893, the same persons, together with Charles G. Blanden, did under their hands make an organization certificate, which said certificate was duly acknowledged before a notary public, and was, together with the acknowledgment thereof, authenticated by the seal of said notary, transmitted to the Comptroller of the Currency of the United States, who received the same on the 20th day of July, A. D. 1893, and duly recorded the same in his office, and said certificate was and is in the words and figures following, to wit:

63 *Organization Certificate.*

We, the undersigned, whose names are specified in article 4th of this certificate, having associated ourselves for the purpose of organizing an association for carrying on the business of banking, under the laws of the United States, do make and execute the following organization certificate:

First. The name of the association shall be "The Market National Bank of Chicago."

Second. The said association shall be located in the city of Chicago, county of Cook, and State of Illinois, where its operations of discount and deposit are to be carried on.

Third. The capital stock of this association shall be five hundred thousand dollars ($500,000), and the same shall be divided into five thousand shares of one hundred dollars each.

Fourth. The name and residence of each of the shareholders of this association, with the number of shares held by each, are as follows:

Name.	Residence.	No. of shares.
Anthony F. Seeberger	Chicago, Illinois	250
William Cox	" "	25
Conway W. Hillman	" "	200
Arthur M. Barnhart	" "	150
Geo. B. Reeve	" "	100
Charles H. Ferguson	" "	250
Henry S. Boutell	" "	100
John Cudahy	" "	100
Simeon H. Busey	Urbana, "	100
David A. Kohn	Chicago, "	100
John A. Sweet	" "	50
Julius S. Grinnell	" "	20
De Forest Skinner	Valparaiso, Ind.	100
Charles G. Blanden	Chicago, Illinois	3,455
		5,000

64 Fifth. This certificate is made in order that we may avail ourselves of the advantages of the aforesaid laws of the United States.

In witness whereof, we have hereunto set our hands, this fifteenth day of July, 1893.

ANTHONY F. SEEBERGER.	JOHN CUDAHY.
WILLIAM COX.	SIMEON H. BUSEY.
CONWAY W. HILLMAN.	DAVID A. KOHN.
ARTHUR M. BARNHART.	JOHN A. SWEET.
GEO. B. REEVE.	JULIUS S. GRINNELL.
CHAS. H. FERGUSON.	DE FOREST SKINNER.
HENRY S. BOUTELL.	CHARLES G. BLANDEN.

STATE OF ILLINOIS, } ss:
County of Cook, }

On this, the fifteenth day of July, A. D. 1893, before me, a notary public, of Chicago, Ill., personally came Anthony F. Seeberger, William Cox, Conway W. Hillman, Arthur M. Barnhart, Geo. B. Reeve, Chas. H. Ferguson, Henry S. Boutell, John Cudahy, Simeon H. Busey, David A. Kohn, John A. Sweet, Julius S. Grinnell, De Forest Skinner, Chas. G. Blanden, to me well known, who severally acknowledged that they executed the foregoing certificate for the purposes therein mentioned.

Witness my hand and seal of office the day and year aforesaid.

WILLIAM H. POWELL,
Notary Public.

[SEAL OF NOTARY.]

17th. On the 25th day of July, A. D. 1893, the said Anthony F. Seeberger, William Cox, Conway W. Hillman, Arthur M. Barnhart, George W. Reeve, Charles H. Ferguson, Julius S. Grinnell,
65 Henry S. Boutell, John Cudahy, David A. Kohn, John A. Sweet and De Forest Skinner, abandoned all further proceedings with respect to the said organization of said Market National Bank of Chicago, as provided in said articles and certificate last mentioned, and the commencement by said Market National Bank of Chicago, of the business of banking, and said Market National Bank of Chicago never was authorized by the Comptroller of the Currency to commence the business of banking, and never did commence the business of banking, nor was any portion of its capital stock ever paid in.

18th. On the 3d day of January, A. D. 1895, said Leander J. McCormick gave to said A. F. Seeberger, as president of the Market National Bank of Chicago, a notice in writing of the desire and intention of him, the said McCormick, to terminate the said lease on May 1, 1895, in accordance with the terms thereof.

That the directors mentioned in the foregoing articles of association were all shareholders in said association, and had full knowledge and consented to the execution of said lease.

19th. That on the 17th day of June, A. D. 1895, said Leander J. McCormick commenced, in the superior court of Cook county, his action of assumpsit against the said Market National Bank of Chicago, as organized under the articles of association and organization certificate, dated January 31, A. D. 1893, to recover from said Market

National Bank of Chicago the rent specified in said lease hereinbefore mentioned, accruing down to May 1, A. D. 1895, together with one-half of the cost of changing the offices and building the vault in said demised premises, in which said suit such proceedings were had that said cause was submitted by the parties to said court
66 for decision upon certain facts then and there agreed upon by said Leander J. McCormick and said Market National Bank of Chicago, which said facts so agreed upon were the same facts and no others that are set forth in the foregoing paragraphs, numbered 1 to 18, both inclusive, of this agreed statement, and thereupon said superior court, on the 16th day of July, A. D. 1895, did render judgment in said suit in favor of said Leander J. McCormick and against said Market National Bank of Chicago, for the sum of two thousand five hundred and forty-eight and $\frac{35}{100}$ (2,548.35) dollars, which said judgment, upon the appeal of said Leander J. McCormick was thereafter, on November 18, A. D. 1895, affirmed by the appellate court of the first district of Illinois, and said judgment of said appellate court was thereafter, on the 11th day of June, A. D. 1896, upon the further appeal of said Leander J. McCormick, affirmed by the supreme court of Illinois; that said sum of two thousand five hundred forty-eight and $\frac{35}{100}$ (2,548.35) dollars, for which judgment was rendered, as aforesaid, was the amount of rent unpaid and accruing under said lease down to August 15, 1893, together with one-half the cost of changing the offices and building the vault in said demised premises, and said courts held that said McCormick was not entitled to recover from said Market National Bank of Chicago, as a corporation, any rent under said lease, accruing subsequent to said 15th day of August, A. D. 1893; and that said organization, known as the Market National Bank of Chicago, as a corporation, had no power to execute the lease in question upon which said suit was brought; that the execution of said lease was not incidental and necessarily preliminary to the organization of said corporation, and that said corporation or organization
67 had not been authorized by the comptroller to commence the business of banking, and that said organization or corporation had at no time authority to do any business, except such as was incidental and necessarily preliminary to its organization; and that said lease after August 15, 1893, was not valid or binding upon said association as a corporation, and the parties hereto agree to refer, and do refer, to the opinion of the appellate court of Illinois, which was adopted by the supreme court of Illinois in said cause, for the purpose of more clearly defining the points decided, and the basis of the judgment of said superior court of Cook county, said opinion being reported in volume 162 of the Illinois Reports, on pages 100 to 110, both inclusive, and being made by reference as part of the stipulation.

This suit is brought against the defendants by the plaintiff, who claims that the defendants were, at the time of the execution of said lease, copartners, or joint obligors, doing business under the name and style of the Market National Bank of Chicago, and further claims that the defendant had the power as such copartners, or joint

obligors, to bind themselves, and did bind themselves, in the manner aforesaid, for the rent falling due under the terms of said lease, after August 15, A. D. 1893, and up to May 1, 1895; the defendants, however, denying that they were or are such copartners or otherwise jointly liable, or that they were or are liable to the plaintiffs as such.

The foregoing facts shall be held to be competent evidence under the pleadings in this cause to the same extent that they would be under any form of pleadings; the intention of the parties being that under the pleadings in this cause the respective parties may
68 establish any cause of action or any defense that they could respectively establish under any form of pleadings; the plaintiff expressly waiving the verification by oath of the pleading of defendants denying joint liability, and agreeing that said plea shall be treated as of the same force as if duly verified by affidavit.

If upon the foregoing facts the court is of the opinion that the plaintiff is entitled to recover of and from the defendants, or any of them named below, judgment is to — entered against such defendant or defendants so liable, who have been served with summons, or who have entered their appearance herein, and in favor of the plaintiff, for such sum as the court is of the opinion the plaintiff is entitled to recover of and from such defendants, or either of them, together with costs of suit; but if, on the contrary, the court is of the opinion that the plaintiff is not entitled to recover of and from the defendants, or either of them, judgment is to be entered in favor of the defendants and against the plaintiff for costs of suit.

July 15, A. D. 1896.

PENCE & CARPENTER,
Att'ys for Plaintiff.
DUNCAN & GILBERT,
Attorneys for Defendants Anthony F. Seeberger, Julius S. Grinnell, Simeon D. Busey, Conway H. Hillman, Charles G. Blanden, Arthur M. Barnhart, John Cudahy, Charles E. Simons, David A. Kohn, George B. Reeve, and Henry S. Boutell.

The foregoing was all the evidence introduced on the trial of this cause.

Upon the trial of said cause the plaintiff, by his attorneys, asked the court to hold as law in the decision of this case the following propositions:

69 1. The court holds that it is the duty of the defendants in this case to prove that the Market National Bank of Chicago had a legal existence and was capable in law of executing the lease in question, and was capable in law of contracting the debt for which defendants are sought to be held liable; otherwise, the plaintiff is entitled to recover judgment against defendants for the full amount of the rent at the rate provided for in said lease from August 15, 1893, up to the date when said lease was terminated, in accordance with its provisions.

(But the court refused so to hold, to which ruling of the court the plaintiff, by his attorneys, then and there duly excepted.)

2. The court holds that the corporation known as the Market National Bank of Chicago was legally organized, but in executing said lease it attempted to do an act which it was not authorized to do, and which it was expressly forbidden to do, and the court holds that the directors and officers conducting or authorizing the execution of said lease themselves became liable thereon for damages for breach of warranty of authority.

(But the court refused so to hold, to which ruling of the court the plaintiff, by his attorneys, then and there duly excepted.)

3. The court holds that the directors and officers of a corporation are special agents of such body, and such special agents, acting in the name and for the benefit of such principal, without having legal authority, are themselves to be regarded as principals, and have all the rights and are subject to all the liabilities of a principal. If the execution of the lease in question was without the legal
70 authority of the Market national bank, then the directors and officers of said corporation become and are liable as principals upon said lease.

(But the court refused so to hold, to which ruling of the court the plaintiff, by his attorneys, then and there duly excepted.)

4. Where a person, holding himself out to be an agent, and the scope of the agency depends upon the existence of a fact or facts which lie particularly within the knowledge of the agent, and such fact or facts, or the non-existence thereof are not known to the party with whom he deals, the agent thereby, by implication, warrants that he has the proper authority, and the want of such authority is a fraud in law upon the party with whom he deals; hence, the court holds that if the authority and right of the officers and directors of the said Market national bank to execute the lease in question depended upon the existence of a fact or facts which would have conferred such authority, had such fact or facts existed, and if such fact or facts, or the non-existence thereof, lay peculiarly within the knowledge of said defendants and such fact or facts, or the non-existence thereof, were not known to the plaintiff, the defendants, by the execution of such lease, by implication, warranted that such fact or facts existed, and that they had the proper authority to execute such lease, and the non-existence of such fact or facts and the want of such authority was a fraud in law upon the plaintiff, and under such circumstances said defendants would be liable for damages for the breach of such warranty of authority.

(But the court refused so to hold, to which ruling of the court the plaintiff, by his attorneys, then and there duly excepted.)

71 5. If the defendants, at the time of the execution of the lease in question, by their words, acts or conduct induced the plaintiff to believe, and the plaintiff did believe, that the Market National Bank of Chicago was fully organized and had authority to commence a banking business, and if such Market National Bank of Chicago did not have such authority, then by such words, acts or conduct the said defendants perpetrated a fraud upon the plaintiff,

and rendered themselves liable as copartners, and thereby became bound as principals to perform the covenants of said lease.

(But the court refused so to hold, to which ruling of the court the plaintiff, by his attorneys, then and there duly excepted.)

6. If the defendants at the time of the execution of the lease in question knew that the Comptroller of the Currency had not given his consent to such corporation to commence a banking business, and if the plaintiff did not know of the want of such consent at that time, then the execution of such lease, which contained a provision that said office so rented should be "*used and occupied by said Market national bank as a banking office, and for no other purpose,*" was a representation to said plaintiff that said corporation had the authority to commence a banking business, and had the consent of the Comptroller of the Currency to that end, as required by law, and plaintiff was legally justified in relying upon such representation. And if no such authority to execute said lease existed at that time, and said plaintiff did not know of the want of such authority, and did not know of the want of consent on the part of said comptroller, then said defendant became thereby personally liable for breach of such warranty of authority.

72 (But the court refused so to hold, to which ruling of the court the plaintiff, by his attorneys, then and there duly excepted.)

7. The court holds that so far as the obligations of these defendants are concerned, the plaintiff was not bound to examine the records of the office of the Comptroller of the Currency to ascertain the facts touching the organization of the Market national bank, and that he was not chargeable with notice of the facts contained in or omitted from such record, touching such organization, so far as defendant's obligations are concerned, and he had the right to rely upon the representations, acts and conduct of the directors and officers of such corporation, respecting its legal organization, and its right to commence a banking business, and its right to execute the lease in question, and a representation need not be expressed, but may be implied, either from acts, silence or other conduct.

(But the court refused so to hold, to which ruling of the court the plaintiff, by his attorneys, then and there duly excepted.)

8. That court holds that if at the time of the execution and delivery of the lease in question, the defendants represented to the plaintiff that the Market national bank was organized under the statutes of the United States as a banking corporation, and was ready to commence a banking business, or concealed from said plaintiff the fact that it was not fully organized as a banking corporation, ready to commence a banking business, and made such representation or concealed such fact, with knowledge of the facts on the part of the defendants, viz: that said corporation had not received the final certificate from the Comptroller of the Currency authorizing it to commence a banking business; and if the plaintiff

73 was then ignorant of the truth of the matter and did not know that the final certificate of the Comptroller of the Currency had not been issued, giving his consent to the commencement

of a banking business, as required by law, and did not know that such corporation was not legally competent to commence a banking business, and if such representation was made, or if such concealment was permitted by said defendants, with the intention that the plaintiff should act upon such representation or concealment of the facts, aforesaid, and if such plaintiff was induced to act upon such representation or by reason of such concealment, in the execution and delivery of such lease, and thereby changed his previous position, then said defendants are estopped by such conduct from denying their liability to the plaintiff, upon the covenants of said lease, and became liable to the plaintiff for the breach of such warranty of authority.

But the court refused so to hold, to which ruling of the court the plaintiff, by his attorneys, then and there duly excepted.

9. The court holds that so far as the obligations of these defendants are concerned, that the plaintiff was not bound to examine the records of the office of the Comptroller of the Currency to ascertain the facts touching the organization of the Market national bank, and that he was not chargeable with notice of the facts contained in, or omitted from such record, touching such organization, and he had the right to rely upon the representations, acts and conduct of the directors and officers of such corporation respecting its legal organization, and its right to commence a banking business, and its right to execute the lease in question, and a representation need not be expressed, but may be implied, either from acts, silence or other conduct.

74 The court holds that if at the time of the execution and delivery of the lease in question the defendants represented to the plaintiff that the Market national bank was organized under the statutes of the United States as a banking corporation and was ready to commence a banking business, or concealed from said plaintiff the fact that it was not fully organized as a banking corporation, ready to commence a banking business, and made such representation or concealed such fact, with knowledge of the facts on the part of the defendants, viz: that said corporation had not received the final certificate from the Comptroller of the Currency, authorizing it to commence a banking business; and if the plaintiff was then ignorant of the truth of the matter and did not know that the final certificate of the Comptroller of the Currency had not been issued, giving his consent to the commencement of a banking business, as required by law, and did not know that such corporation was not legally competent to commence a banking business, and if such representation was made, or if such concealment was permitted by said defendants with the intention that the plaintiff should act upon such representation or concealment of the facts aforesaid, and if said plaintiff was induced to act upon such representation or by reason of such concealment, in the execution and delivery of such lease, and thereby changed his previous position, then said defendants are estopped by such conduct from denying their liability to the plaintiff upon the covenants of said lease, and became liable to the plaintiff for the performance of such covenants.

But the court refused so to hold, to which ruling of the court the plaintiff, by his attorneys, then and there duly excepted.

10. The Market National Bank of Chicago was legally
75 organized to transact such business as was incidental and necessarily preliminary to its organization, but was expressly prohibited from commencing the business of banking, or doing other things incidental thereto, as it had not been authorized by the Comptroller of the Currency to commence the business of banking.

That if the Comptroller of the Currency had authorized said corporation to commence the business of banking, then the execution and delivery of such lease would have been incidental to such banking business, and binding upon said corporation; that the right to commence such banking business at the time of the execution and delivery of said lease depended upon the existence of a fact, viz: the consent of the Comptroller of the Currency, the non-existence of which fact was known to said defendants, and was not known to said plaintiff.

The court holds that if at the time of the execution and delivery of the lease in question the defendants represented to the plaintiff that the Market national bank was organized under the statutes of the United States as a banking corporation, and was ready to commence a banking business, or concealed from said plaintiff the fact that it was not fully organized as a banking corporation, ready to commence a banking business, and made such representation or concealed such fact, with knowledge of the facts on the part of the defendants, viz: that said corporation had not received the final certificate from the Comptroller of the Currency, authorizing it to commence a banking business; and if the plaintiff was then ignorant of the truth of the matter and did not know that the final certificate of the Comptroller of the Currency had not been issued, giving his consent to the commencement of a bank-
ing business, as required *as* law, and did not know that
76 such corporation was not legally competent to commence a banking business, and if such representation was made, or if such concealment was permitted by said defendants, with the intention that the plaintiff should act upon such representation or concealment of the facts aforesaid, and if said plaintiff was induced to act upon such representation or by reason of such concealment, in the execution and delivery of such lease, and thereby changed his previous position, then said defendants are estopped by such conduct from denying their liability to the plaintiff, and such acts, conduct and representations constituted an implied warranty of authority on the part of said defendants, and they became liable for damages to plaintiff for the breach of such implied warranty.

But the court refused so to hold, to which ruling of the court the plaintiff, by his attorneys, then and there duly excepted.

And the court refused to hold and find the foregoing propositions as law, or any of them, to which said refusal so to hold and find as the law, the plaintiff then and there excepted by his attorneys.

Thereupon the court found the issues joined in favor of the de-

fendants, to which finding the plaintiff, by his attorneys, then and there excepted.

Thereupon the court entered judgment upon said finding in favor of said defendants, and against the said plaintiff for costs, to the entering of which said judgment the plaintiff, by his attorneys, then and there duly excepted.

And forasmuch as the matters and things aforesaid do not appear of record, the plaintiff prays that this, his bill of exceptions, may be signed and sealed, which is done accordingly.

13th May, 1897.

JOHN BARTON PAYNE, [SEAL.]
Judge of the Superior Court of Cook County.

O K.
H. GILBERT,
For Defendant.

77 And afterwards, to wit, on the 12th day of May, A. D. 1897, there was filed in the office of the clerk of said court a certain appeal bond, which is in the words and figures as follows, to wit:

Know all men by these presents that I, Leander J. McCormick, of the county of Cook and State of Illinois, *and* held and firmly bound unto Anthony F. Seeberger, William Cox, Julius S. Grinnell, Charles H. Ferguson, Simeon H. Busey, Conway W. Hillman, Charles G. Blanden, Charles D. Seeberger, Arthur M. Barnhart, John Cudahy, Charles E. Simons, Seneca D. Kimbark, David A. Kohn, George B. Reeve, and Henry S. Boutell, also of the same county and State, in the penal sum of two hundred and fifty (250) dollars, lawful money of the United States; for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly, severally, and firmly by these presents.

Witness our hands and seals this 4th day of March, A. D. 1897.

The condition of the above obligation is such that whereas
78 the said Anthony F. Seeberger, William Cox, Julius S. Grinnell, Charles H. Ferguson, Simeon H. Busey, Conway W. Hillman, Charles G. Blanden, Charles D. Seeberger, Arthur M. Barnhart, John Cudahy, Charles E. Simons, Seneca D. Kimbark, David A. Kohn, George B. Reeve, and Henry S. Boutell did, on the 1st day of May, A. D. 1897, in the superior court of Cook county, in the State aforesaid, and of the April term thereof, A. D. 1897, recover a judgment against the above-bounded Leander J. McCormick, besides costs of suit; from which said judgment of the said superior court of Cook county the said Leander J. McCormick has prayed for and obtained an appeal to the appellate court within and for the first district, in said State.

Now, therefore, if the said Leander J. McCormick shall duly prosecute his said appeal with effect, and moreover pay the amount of the judgment, costs, interests, and damages rendered and to be rendered against him in case the said judgment shall be affirmed in

said appelalte court, then the above obligation to be void;
79 otherwise to remain in full force and virtue.

LEANDER J. McCORMICK. [SEAL.]
By G. A. CARPENTER, *Attorney-in-fact.*

Approved:
JOHN BARTON PAYNE,
Judge Superior Court of Cook County.

O K.
DUNCAN & GILBERT.

Appellate Court of Illinois, First District, October Term, A. D. 1897.

LEANDER J. McCORMICK, Appellant, *vs.* ANTHONY F. SEEBERGER ET AL., Appellee. } Appeal from Superior Court.

80 *Assignment of Errors.*

Now comes said appellant, by Pence & Carpenter, his attorneys, and says that in the record and proceeding aforesaid, there is manifest error in this, to wit:

1st. The superior court erred in not finding the issues for plaintiff and in finding them for the defendants.

2d. The superior court erred in not entering judgment for plaintiff and in entering judgment for costs in favor of defendants and against said plaintiff.

3d. The superior court erred in not holding as law in the decision of said cause that it was the duty of defendants to prove that the Market National Bank of Chicago had a legal existence, and was capable in law of executing the lease in question in order to defeat plaintiff's claim, and it was error for said court to refuse to hold as law proposition *No. 1*, as tendered to the court.

4th. The superior court erred in not holding as law in the decision of said cause that the directors and officers conducting or authorizing the execution of said lease themselves became liable thereon for damages for breach of warranty, of authority, and it was error for said court to refuse to hold as law proposition *No. 2*, as tendered to the court.

5th. The superior court erred in not holding as law in the decision of said cause that the defendants, acting in the name and for the benefit of the Market national bank, without having legal authority, are themselves to be regarded as principals, and subject to all the liabilities of a principal, and that if the execution of the lease
81 in question was without legal authority of the Market national bank, then the directors and officers of said corporation became and were liable as principals upon said lease, and it was error for said court to refuse to hold as law proposition *No. 3*, as tendered to the court.

6th. The superior court erred in not holding as law in the decision of said cause that if the authority and right of the officers and

directors of said bank to execute the lease in question depended upon the existence of a fact or facts, which would have conferred such authority had such fact or facts existed, and if such fact or facts, or the non-existence thereof, lay peculiarly within the knowledge of said defendants, and such fact or facts, or the non-existence thereof, were not known to the plaintiff, then the defendants, by the execution of such lease, by implication, warranted that such fact or facts existed, and that they had the proper authority to execute such lease, and the non-existence of such fact or facts, and the want of such authority, was a fraud in law upon the plaintiff; and under such circumstances said defendants would be liable for damages for the breach of such warranty of authority, and it was error for said court to refuse to hold as law proposition *No. 4*, as tendered to said court.

7th. The superior court erred in not holding as law in the decision of said cause that if the defendants, at the time of the execution of the lease in question, by their words, acts or conduct, induced the plaintiff to believe, and the plaintiff did believe, that said bank was fully organized and had authority to commence a banking business, and if said bank did not have such authority, then by such words, acts or conduct the said defendants perpetrated a fraud upon the plaintiff, and rendered themselves liable as copartners, and became bound as principals, to perform the covenants of
82 said lease, and it was error for said court to refuse to hold as law proposition *No. 5*, as tendered to said court.

8th. The superior court erred in not holding as law in the decision of said cause that if the defendants, at the time of the execution of the lease in question knew that the Comptroller of the Currency had not given his consent to said bank to commence a banking business, and if the plaintiff did not know of the want of such consent at that time, then the execution of such lease, which contained a provision that said office, so rented, should be "used and occupied by said Market national bank as a banking office, and for no other purpose," was a representation to said plaintiff that said corporation had the authority to commence a banking business, and had the consent of the Comptroller of the Currency to that end, as required by law, and plaintiff was legally justified in relying upon such representation; and if no such authority to execute said lease existed at that time, and said plaintiff did not know of the want of consent on the part of said comptroller, then said defendant became thereby personally liable for breach of such warranty of authority, and it was error for such court to refuse to hold as law proposition *No. 6*, as tendered to said court.

9th. The superior court erred in not holding as law in the decision of said cause, that so far as the obligations of said defendants are concerned, the plaintiff was not bound to examine the records of the office of the Comptroller of the Currency to ascertain the facts touching the organization of said bank, and that plaintiff was not chargeable with notice of the facts contained in or omitted from such record touching such organization, so far as

defendants' obligations are concerned, and that plaintiff had
83 the right to rely upon the representations, acts and conduct of the directors and officers of such corporation, respecting its legal organization, and its right to commence a banking business, and its right to execute the lease in question, and the representation need not be expressed but may be implied, either from acts, silence or conduct, and it was error for said court to refuse to hold as law proposition *No. 7*, as tendered to the court.

10th. The superior court erred in not holding as law in the decision of said cause, that if, at the time of the execution and delivery of the lease in question, the defendants represented to the plaintiff that said bank was was organized under the statutes of the United States as a banking corporation, and was ready to commence business, or concealed from said plaintiff the fact that it was not fully organized as a banking corporation, ready to commence a banking business, and made such representation or concealed such fact with knowledge of the facts on the part of the defendants, viz., that said corporation had not received the final certificate from the Comptroller of the Currency, authorizing it to commence a banking business, and if the plaintifi was then ignorant of the truth of the matter, and did not know that the final certificate of the Comptroller of the Currency had not been issued, giving his consent to the commencement of a banking business, as required by law, and did not know that such corporation was not legally competent to commence a banking business, and if such representation was made, or if such concealment was permitted by said defendants, with the intention that the plaintiff should act upon such representation or concealment of the facts aforesaid, and if said plaintiff was induced to act upon such representation or by reason of such concealment in the execution and delivery of such lease, and thereby
84 changed his previous condition, then defendants are estopped by such conduct from denying their liability to plaintiff upon the covenants of such lease, and became liable to the plaintiff for the breach of such warranty of authority, and it was error for said court to refuse to hold as law proposition *No. 8*, as tendered to the court.

11th. The superior court erred in refusing to hold as law proposition *No. 9*, as tendered to the court, to which appellant refers and makes a part of this assignment.

12th. The superior court erred in refusing to hold as law proposition No. 10, as tendered to the court, to which appellant refers and makes a part of this assignment.

13th. The superior court erred in refusing to hold as law each and all propositions tendered to said court upon said trial by the plaintiff and numbered 1 to 10 inclusive.

14th. The finding and judgment of the superior court was contrary to the law.

15th. The finding and judgment of the superior court was contrary to the evidence.

Wherefore, appellant prays that said judgment may be set aside,

vacated and held for naught, and he may be restored to all he has lost by reason thereof.

PENCE & CARPENTER,
Attorneys for Appellant.

85 At a term of the appellate court begun and held at Chicago, on Tuesday, the fifth day of October, in the year of our Lord one thousand eight hundred and ninety-seven, within and for the first district of the State of Illinois.

Present: Hon. Francis Adams, presiding justice.
" " Thomas G. Winder, justice.
" " Nathaniel C. Sears, justice.
Thomas N. Jamieson, clerk; James Pease, sheriff.

LEANDER J. MCCORMICK, Appellant, *vs.* ANTHONY F. SEEBERGER ET AL., Appellees.	No. 7199. Appeal to Cook Superior. Error to Cook.

Be it remembered that on the 2nd day of November, A. D. 1897, it being one of the days of said October term, A. D. 1897, certain proceedings were had in said court and entered of record in words and figures following, to wit:

86 LEANDER J. MCCORMICK *vs.* ANTHONY F. SEEBERGER ET AL	7199. Error to Cook. Appeal from Cook Superior.

This cause, having this day been reached in the call of the docket, was argued by counsel for respective parties, and the court, not being fully advised in the premises, doth order that said cause be taken under advisement.

And afterwards, on the 6th day of January, A. D. 1898, the following proceedings were had and entered of record in said cause, to wit:

87 LEANDER J. MCCORMICK, Appellant, *vs.* ANTHONY F. SEEBERGER, WILLIAM COX, Julius S. Grinnell, Charles H. Ferguson, Simeon H. Busey, Conway W. Hillman, Charles G. Blanden, Charles D. Seeberger, Arthur M. Barnhart, John Cudahy, Charles E. Simons, Seneca D. Kimbark, David A. Kohn, George B. Reeve, and Henry S. Boutell, Appellees.	7199. Appeal, Cook Superior.

On this day came again the said parties, and the court, having diligently examined and inspected as well the record and proceedings aforesaid as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, are of the opinion that in the record and proceedings aforesaid and

in the rendition of the judgment aforesaid there is manifest
88 error; therefore it is considered by the court that for that error and others in the record and proceedings aforesaid the judgment of the superior court of Cook county in this behalf rendered be reversed, annulled, set aside, and wholly for nothing esteemed, and finds the facts as set forth in the stipulation in the record.

And it is further considered by the court that the said appellant recover of and from the said appellees the sum of $22,208.33 and his costs by him in this behalf expended, to be taxed, and that he have execution therefor.

And afterwards, on the 27th day of January, A. D. 1897, the following proceedings were had and entered of record in said cause, to wit:

LEANDER J. McCORMICK
v.
ANTHONY F. SEEBERGER ET AL. } Appeal, Superior.

89 The court, having considered the petition of appellees praying for a rehearing in said cause and being now fully advised in the premises, doth order that said petition for a rehearing be, and the same *as* hereby, denied.
(Judge Winder dissents.)

And afterwards, on the 21st day of February, A. D. 1898, the following proceedings were had and entered of record in said cause, to wit:

LEANDER J. McCORMICK
vs.
ANTHONY F. SEEBERGER ET AL. } 7199. Appeal, Superior.

This day came appellant, by his counsel, and moved the court for leave to amend the judgment entered in said cause; and the court, being fully advised in the premises, doth order that said motion be, and the same is hereby, allowed by striking out the name- of Charles H. Ferguson, William Cox, Charles D. Seeberger, and Seneca
90 D. Kimbark, named therein as appellees.

I, Thomas N. Jamieson, clerk of the appellate court in and for the first district of the State of Illinois, do hereby certify that the foregoing is a true copy of the final order and judgment and all other proceedings of the said appellate court in the above-entitled cause of record in my office.

In testimony whereof I have set my hand and affixed
[SEAL.] the seal of the said appellate court, at Chicago, this 25th day of February, in the year of our Lord one thousand eight hundred and ninety-eight.

THOMAS N. JAMIESON,
Clerk of the Appellate Court of the First District.

Supreme Court of Illinois, April Term, A. D. 1898.

ANTHONY F. SEEBERGER ET AL., Plaintiffs in Error, *v.* LEANDER J. MCCORMICK, Defendant in Error.	Error to Appellate Court, First District.

91 And now come the plaintiffs in error, by Hiram T. Gilbert, their attorney, and say that in the record and proceedings of the appellate court in this cause manifest error hath intervened, to the injury of said plaintiffs in error, in this:

First. The appellate court erred in not affirming the judgment of the superior court of Cook county.

Second. The appellate court *found* in reversing the judgment of the superior court of Cook county.

Third. The appellate court erred in entering judgment against plaintiff- in error and in favor of defendant in error in manner and form as the same was entered.

Fourth. The damage- awarded by the appellate court to defendant in error are excessive.

Whereupon, for this and other errors apparent in the record, the plaintiff- in error pray that the judgment of the appellate court may be reversed, etc.

HIRAM T. GILBERT,
For Plaintiff- in Error.

92 *Cross-errors Assigned by Defendant in Error.*

And now comes said defendant in error, by Pence & Carpenter, his attorneys, and say- that in the record and proceedings of the appellate court in this cause manifest error hath intervened, to the injury of said defendant in error, in this:

1st. The damage- awarded by the appellate court to the defendant in error are insufficient, and that interest, at the rate of five (5) per cent. per annum, should have been computed upon the unpaid rent from the dates when the same fell due, according to the terms of said lease, and should have been added to the amount of said damages allowed by the court.

2nd. The appellate court omitted, neglected, and refused to allow interest upon the installments of rent as the same fell due from time to time, according to the terms of said lease.

Wherefore, for these errors apparent in the record, the defendant in error prays that the judgement of the appellate court may be reversed, etc.

PENCE & CARPENTER,
Attorneys for Defendant in Error.

93 And afterwards, to wit, on the 18th day of April, A. D. 1898, certain proceedings were had and orders entered as follows, viz:

ANTHONY F. SEEBERGER, WILLIAM COX, JULIUS S. GRINNELL, Chas. H. Ferguson, H. Busey, Conway W. Hillman, Chas. G. Blanden, Chas. D. Seeberger, Arthur M. Barnhart, John Cudahy, David A. Kohn, Geo. B. Reeve, and Henry S. Boutell
vs.
LEANDER J. MCCORMICK
} Error to First District.

Now, on this day, come the parties hereto, and this being one of the days set apart for the call of the docket under the rules of this court, and it appearing to the court that plaintiff in error hath filed herein a duly certified transcript of the record and proceedings of the court below, together with printed abstracts thereof and
94 briefs and arguments of counsel in support of the errors assigned herein, and entered motion to reverse the judgment and remand said cause and for costs, and the said defendant in error having entered motion to affirm said judgment and for costs and *procedendo*, and said motions being taken under advisement for final hearing, and the clerk of this court reporting that said cause is now ready to be taken, *and* said cause is here submitted for the consideration and judgment of the court.

Therefore it is ordered by the court that this cause be, and the same is hereby, taken under advisement.

95 At a supreme court begun and held at Springfield, on Tuesday, the fourth day of October, in the year of our Lord one thousand eight hundred and ninety-eight, within and for the State of Illinois.

Present: Joseph N. Carter, chief justice; Alfred M. Craig, justice; Jacob W. Wilkin, justice; James H. Cartwright, justice; Benjamin D. Magruder, justice; Jesse J. Phillips, justice; Carroll C. Boggs, justice; Edward C. Akin, attorney general; Edward A. Baxter, sheriff.

Attest: CHRISTOPHER MAMER, *Clerk.*

Be it remembered, to wit, on the 24th day of October, A. D. 1898, the same being in vacation after the term of court aforesaid, the following proceedings were by said court had and entered of record, to wit:

96 ANTHONY F. SEEBERGER, WILLIAM COX, Julius S. Grinnell, Chas. H. Ferguson, Simeon H. Busey, Conway W. Hillman, Chas. G. Blanden, Chas. D. Seeberger, Arthur M. Barnhart, John Cudahy, David A. Kohn, Geo. B. Reeve, and Henry S. Boutell
vs.
LEANDER J. MCCORMICK.
} Error to First District.

And now, on this day, this cause having been argued by counsel, and the court having diligently examined and inspected as well

the record and proceedings aforesaid as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, for that it appears to the court now here that neither in the record and proceedings aforesaid is there anything erroneous, vicious, or defective, and in that record there is no error; therefore it is considered by the court that the
97 judgment aforesaid be affirmed in all things and stand in full force and effect, notwithstanding the said matters and things therein assigned for error; and it is further considered by the court that the said defendant in error recover of and from the said plaintiff in error his costs by him in this behalf expended, and that he have execution therefor.

98 At a supreme court begun and held at Springfield, on Tuesday, the sixth day of December, in the year of our Lord one thousand eight hundred and ninety-eight, within and for the State of Illinois.

Present: Joseph N. Carter, chief justice; Alfred M. Craig, justice; Jacob W. Wilkin, justice; James H. Cartwright, justice; Benjamin D. Magruder, justice; Jesse J. Phillips, justice; Carroll C. Boggs, justice; Edward C. Akin, attorney general; Charles M. Woods, sheriff.

Attest: CHRISTOPHER MAMER, *Clerk.*

Be it remembered that afterwards, to wit, on the second day of December, A. D. 1898, certain proceedings were had and orders entered as follows, viz:

99 ANTHONY F. SEEBERGER, WILLIAM COX, JULIUS S. GRINNELL, CHAS. H. FERGUSON, SIMEON H. BUSEY, CONWAY W. HILLMAN, CHAS. G. BLANDEN, CHAS. D. SEEBERGER, ARTHUR M. BARNHART, JOHN CUDAHY, DAVID A. KOHN, GEO. B. REEVE, AND HENRY S. BOUTELL

vs.

LEANDER J. MCCORMICK.

} Error to First District.

And now, on this day, the court having duly considered the petition for a rehearing herein and being fully advised, it is considered by the court that a rehearing be, and the same is hereby, granted herein.

100 And afterwards, to wit, on the 20th day of December, A. D. 1898, certain proceedings were had and orders entered as follows, viz:

ANTHONY F. SEEBERGER, WILLIAM COX, JULIUS S. GRINNELL, Chas. H. Ferguson, Simeon H. Busey, Conway H. Hillman, Chas. G. Blanden, Chas. D. Seeberger, Arthur M. Barnhart, John Cudahy, David A. Kohn, George B. Reeve, and Henry S. Boutell
vs.
LEANDER J. MCCORMICK.

No. 57. Error to First District.

Now, on this day, come the parties hereto, and this being one of the days set apart for the call of the docket under the rules of this court, and it appearing to the court that a rehearing has been granted herein, and plaintiff in error hath filed a duly cer-
101 tified transcript of the record and proceedings of the court below, together with printed abstracts thereof, and briefs and arguments of counsel in support of the errors assigned herein, and entered motion to reverse the judgment and remand said cause and for costs, and the said defendant in error having entered motion to affirm said judgment, and for costs and *procedendo*, and said motions being taken under advisement for final hearing, and the clerk of this court reporting that said cause is now ready to be taken, and said cause is here submitted for the consideration and judgment of the court:

Therefore it is ordered by the court that this cause be, and the same is hereby, taken under advisement.

102 At a supreme court begun and held at Springfield, on Tuesday, the seventh day of February, in the year of our Lord one thousand eight hundred and ninety-nine, within and for the State of Illinois.

Present: Joseph N. Carter, chief justice; Alfred M. Craig, justice; Jacob W. Wilkin, justice; James H. Cartwright, justice; Benjamin D. Magruder, justice; Jesse J. Phillips, justice; Carroll C. Boggs, justice; Edward C. Akin, attorney general; Charles M. Woods, sheriff.

Attest: CHRISTOPHER MAMER, *Clerk*.

Be it remembered, to wit, on the seventeenth day of February, A. D. 1899, the same being one of the days of the term of court aforesaid, the following proceedings were by said court had
103 and entered of record, to wit:

ANTHONY F. SEEBERGER, WILLIAM COX, Julius S. Grinnell, Chas. H. Ferguson, Simeon H. Busey, Conway W. Hillman, Chas. G. Blanden, Chas. D. Seeberger, Arthur M. Barnhart, John Cudahy, David A. Kohn, Geo. B. Reeve, and Henry S. Boutell
vs.
LEANDER J. MCCORMICK.

Error to First District.

And now, on this day, this cause having been argued by counsel, and the court having diligently examined and inspected as well the

record and proceedings aforesaid as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, for that it appears to the court now here that neither in the record and proceedings aforesaid nor in the rendition
of the judgment aforesaid is there anything erroneous, vicious,
104 or defective, and that in that record there is no error:

Therefore it is considered by the court that the judgment aforesaid be affirmed in all things and stand in full force and effect, notwithstanding the said matters and things therein assigned for error; and it is further considered by the court that the said defendant in error recover of and from the said plaintiff in error his costs by him in this behalf expended, and that he have execution therefor.

105 At a supreme court begun and held at Springfield, on Tuesday, the 7th day of February, in the year of our Lord one thousand eight hundred and ninety-nine, within and for the State of Illinois.

Present: Joseph N. Carter, chief justice; Alfred M. Craig, justice; Jacob W. Wilkin, justice; James H. Cartwright, justice; Benjamin D. Magruder, justice; Jesse J. Phillips, justice; Carroll C. Boggs, justice; Edward C. Akin, attorney general; Charles M. Woods, sheriff.

Attest: CHRISTOPHER MAMER, *Clerk.*

Be it remembered that afterwards, to wit, on the seventeenth day of February, 1899, the opinion of the court was filed in the words and figures following, to wit:

A. F. SEEBERGER
vs.
L. J. MCCORMICK. } No. 5, R. H. Error to First District. Appeal from.

106 Docket No. 233, Agenda 78, Northern Div., Dec., '98.

ANTHONY F. SEEBERGER ET AL.
v.
LEANDER J. MCCORMICK.

Mr. Chief Justice CARTER delivered the opinion of the court:

Defendant in error, Leander J. McCormick, brought assumpsit in the superior court of Cook county against the plaintiffs in error, Anthony F. Seeberger and others, as copartners, to recover rent accruing from August 15, 1893, to May 1, 1895, upon a lease made by McCormick to the Market National Bank of Chicago of a certain office, to be used exclusively for the purposes of a bank. The rent stipulated in the lease was $13,000 per annum, payable $1,083.33 monthly. Besides the common counts the declaration contained a special count declaring specially on the written lease. Besides the general issue the defendants below filed special pleas denying their joint liability, but before the issues were made the parties waived a jury and submitted the case to the court for decision upon a writ-

ten stipulation as to the pleadings and the facts, which was incorporated in the bill of exceptions and which contains the following: "The foregoing facts shall be held to be competent evidence, under the pleadings in this cause, to the same extent that they would be under any form of pleadings, the intention of the parties being that under the pleadings in this cause the respective parties may establish any cause of action or defense that they could, respectively, establish under any form of pleadings." The lease was set out in full in the stipulation, and showed that it was executed by plaintiff, McCormick, and by the Market national bank, by Seeberger, as its president, and Cox, its cashier. The defendants were all shareholders and directors of the bank. The bank was organized and incorporated but had not received a certificate of the Comptroller of the Currency authorizing it to transact a banking business. No such certificate was ever issued, and the organization was abandoned within a few months after its inception, but it and its officers occupied the leased premises from May 1 until August 15, 1893, when the officers of the bank vacated and offered to surrender the premises to McCormick, and upon his refusal to accept such surrender left the key upon his desk. In October following, under another agreement between the lessor and lessee, the lessor took possession of the premises to lease the same
107 upon such terms as might be agreed upon, to avoid as much loss as possible, with the agreement that it was to be without prejudice to the rights of either party; but the property was not rented, and it remained vacant until the lease was terminated, in 1895, in pursuance of its terms, when McCormick brought suit against the Market national bank to recover the rent stipulated in the lease, but as the national banking act provides that "no association shall transact any business, except such as incidental and necessarily preliminary to its organization, until it has been authorized by the Comptroller of the Currency to commence the business of banking," and as the comptroller had not given such authority, it was held that the bank had no power to enter into the lease, and could be held liable only for use and occupation until the premises were vacated, August 15, 1893. (*McCormick v. Market Nat. Bank*, 61 Ill. App., 33; 162 Ill., 100; 165 U. S., 538.) McCormick then brought this suit for the rent for the rest of the term, against the officers, directors and shareholders of the bank, as before stated.

Ten propositions were asked by the plaintiff below to be held as law in the decision of the case, but the court refused all of them and rendered judgment for the defendants. None were asked by the defendants. The plaintiff appealed, and the appellate court reversed the judgment and found "the facts as set forth in the stipulation in the record," and entered judgment against the defendants, and assessed the damages at the amount of the rent stipulated in the lease from August 15, 1893, to May 1, 1895, $22,208.33. The defendants then sued out this writ of error to reverse that judgment.

A preliminary question is raised by McCormick, the defendant in error, that as plaintiffs in error submitted no propositions to be

held as law by the trial court in the decision of the case, and preserved no exceptions to any ruling of that court, there is no question of law preserved for this court to decide; that the decision of the appellate court was upon the facts, and is final and conclusive. It is undoubtedly true that unless some question of law is presented by the record for our decision we can do nothing more than affirm the judgment, for we have no power to review the decision of the appellate court upon questions of fact. It is, however, contended by the plaintiffs in error that all questions of law necessary
108 for a full review of the judgment of the appellate court upon its merits are preserved for our consideration in one of two ways: First, that the finding of the appellate court that the facts were as set forth in the stipulation in the record must be treated as a finding of the facts different from the facts as found by the trial court, and that the sufficiency of the facts as found to support the judgment raises a question of law for decision by this court; second, that if it be held that the appellate court found the facts the same as they were found by the trial court, then the appellate court must have held the law different from the holding in that respect by the trial court in refusing to hold the propositions asked by the plaintiff below as law in the decision of the case—that is to say, that these propositions contained the plaintiff's contentions as to the law of the case and were refused, and if the appellate court and the trial court agreed as to the facts, the effect of the judgment of the appellate court was to reverse the decision of the trial court upon these propositions of law and to hold that they should have been held as law in the decision of the case, and that this decision of the appellate court raises here the questions of law presented by these propositions.

After a further consideration of the case on rehearing we have reached the conclusion that the contentions of plaintiffs in error on this branch of the case must prevail. We are not disposed to defeat the right of review in this court by adopting the refined distinctions urged upon us by defendant in error. Counsel on both sides have cited and reviewed many cases decided in this court similar in some respects to this, but none where this precise question has been decided. The question has usually arisen where the judgment of the trial court has been affirmed by the appellate court and the facts found the same as by the trial court. In such a case, where no question of law decided by the trial court has been preserved for decision, the judgment of the appellate court upon the facts as found below is necessarily conclusive. But in the case at bar not only has the judgment of the trial court been reversed, but a judgment for the demand of the plaintiff has been rendered by the appellate court. We shall consider first the second question raised by plaintiffs in error—that is, that questions of law are presented here by the decision of the appellate court upon the propositions presented in the trial court by the plaintiff there, which may be availed of by them.

109 If because of, or notwithstanding, the finding of the appellate court that it found "the facts as set forth in the stipu-

lation" it should be held that the appellate court found the facts the same as found by the trial court—that is, that the two courts agreed not only as to the facts stated in the stipulation, (which they did, of course,) but also as to all proper inferences of fact to be drawn from the agreed facts—then it follows, necessarily, that the appellate court reversed the judgment for errors of law; and in the absence from the record of any question of law having been raised by the record except by the propositions of law, it should be presumed that the appellate court, while agreeing with the trial court as to the facts, disagreed as to the propositions of law, and was of the opinion that they, or some of them, should have been held as law in the decision of the case. Now, no exceptions can be taken or saved in the appellate court to its rulings or decisions, and as any question of law arising upon the record proper may be availed of on appeal or on error, it follows that if the effect of the decision of the appellate court was to hold that said propositions tendered by the plaintiff below stated the law correctly and should have been held, such decision of the appellate court was adverse to defendants, and can be availed of here as fully as if it had arisen upon propositions held as law presented by them and decided by the appellate court to have been erroneous. They could have taken and saved no exceptions in the trial court in either case, the rulings there being in their favor. Whether they might not, by propositions of their own, have presented questions of law not raised by the propositions presented by the plaintiff is not the question, but the point is that they may assign as error for what it is worth the adverse decision of the appellate court holding that the propositions which were presented by their adversary and refused in the trial court were correct and should have been held. Instead of finding and reciting in its judgment the ultimate facts, if it found the facts in whole or in part different from the finding of the trial court, as was done in *Huyett & Smith Co. v. Edison Co.*, 167 Ill., 233, and held proper in *Hayes v. Massachusetts Life Ins. Co.*, 125 *id.*, 626, and other decisions of this court, the appellate court simply found the facts as
110 set forth in the stipulation, which, of course, embraced many mere evidentiary facts from which the ultimate facts may have been deduced or inferred. As we have held, the statute (the 87th section of the practice act) applies as well where the facts are agreed upon as where they are proved by witnesses, such agreed facts being treated in the same way as the evidence would be treated if proved by witnesses. *Huyett & Smith Co. v. Edison Co., supra; Bolton v. Johnston*, 163 Ill., 234; *Grabbs v. City of Danville*, 166 *id.*, 441.

The finding as made by the appellate court has led to the uncertainty in the record whether its judgment is the result of finding the facts different from the facts as found by the trial court, or as the result of a conclusion that the trial court erred in not holding as law the propositions submitted on the trial; but as in this case we are of the opinion that the same questions of law arise in either event, that uncertainty cannot materially affect the decision of the case. In considering, then, the view of the case (which we are in-

clined to adopt) that the finding of the appellate court was a finding of the facts different from the facts found by the trial court, the question of law is raised by the record itself whether or not the facts as found are legally sufficient to support the judgment. In passing upon this question every inference of fact arising from the evidentiary facts which are contained in the finding, which tends to support the judgment, must be indulged as fully as in case the question arose on an instruction or proposition of law in the trial court that a certain one of the parties was entitled to recover. So treating the finding of the appellate court as a finding of the ultimate facts upon which it based its judgment of damages then recovered for the first time by the plaintiff, the legal question arises, independently of any propositions of law, whether the law authorized the judgment which was rendered on such facts, or not. This is necessarily so, otherwise there might be no way to raise this question, not of fact but of law, in this court in cases of this character. A proposition asked in the trial court to be held as law would not necessarily raise it, for such a proposition that the designated party was or was not entitled to recover under the evidence would be properly refused if there was any evidence which, in the eye of the law, tended to prove the contrary, and the appellate court would, on appeal or writ of error, so hold, but at the same time, as the final arbiter of the facts, would re-
111 verse the judgment on the facts and enter a final judgment of its own upon the evidence, and find and recite in its judgment the facts contrary to the finding below. In such a case the exception saved by the party who had offered the proposition would avail him nothing in questioning the legal sufficiency of the facts as found and recited by the appellate court to support its judgment. It cannot be supposed that the law intended that the appellate court should not only have the power to determine finally and conclusively all questions of fact in cases at law, and to enter final judgment upon a finding of the facts different from the finding below, but also to settle, beyond the power of review, all questions of law arising as to the sufficiency of such facts there found and settled for the first time to support its judgments. Thus, it was held in *Borg v. Chicago, Rock Island and Pacific Railway Co.*, 162 Ill., 348, that the power of the appellate court to reverse without remanding where it finds the facts different from the facts as found by the trial court is not limited to cases where the trial court might direct a verdict, but extends to cases where the evidence must be weighed. See, also, *Everts v. Lawther*, 165 Ill., 487, and *City of Spring Valley v. Spring Valley Coal Co.*, 173 *id.*, 497. No question arises in the case at bar as to the power of the appellate court to enter the judgment for the plaintiff's demand, as in the cases cited, for the reason that trial by jury was waived, and, besides, judgment was stipulated for. In 173 Ill., p. 503, above cited, in speaking of the 87th section of the practice act, we said: "That section has been acted upon in numerous cases, and it has always been held that the only question which can be presented to this court is whether the facts as found and recited in the judgment justify the judgment rendered by the

appellate court." Also in *Hawk v. Chicago, Burlington and Northern Railroad Co.*, 147 Ill., 399, where there was a reversal and a finding and recital of the facts, we said: "Under our former decisions there is but one question presented for consideration, and that is, conceding the facts to be as found by the appellate court, was the law properly applied in that court?"

Considering, then, the case upon the questions of law arising on the record, the judgment of the appellate court must rest, and be sustained, if at all, upon one of three legal propositions, and
112 counsel for McCormick insist that it can be sustained upon any one of them: First, that plaintiffs in error are liable to McCormick as copartners, by virtue of the lease to the bank of which they were directors and by virtue of the agreed facts, the lease failing to bind the bank; or, second, that they are liable on their implied warranty, in acting for the bank, that all the necessary steps had been taken in organizing the bank, so that it was authorized to execute the lease; or, third, that plaintiffs in error are liable to defendant in error in an action on the case for deceit, for falsely assuming an authority which they did not possess and by which he was misled to his injury.

The stipulation, among other things, contains the following: "The said Leander J. McCormick, at the time of the negotiations prior to the execution of said lease and at the time of the execution of said lease, and at the time when said officers of said Market National Bank of Chicago took possession of the demised premises on the 22d day of June, A. D. 1893, understood and believed that said Market National Bank of Chicago was duly and legally organized as a national bank, and that, as such, it was ready to do a banking business, and that it had the power to enter into said lease and the agreements connected therewith, and had no knowledge or information to the contrary until the 15th day of August, A. D. 1893, at which time the officers of the said Market National Bank of Chicago informed said McCormick that said Market National Bank of Chicago had no power to enter into said lease, and offered to surrender to said McCormick said demised premises and said lease, and the said McCormick was then and there informed by the said officers of said Market National Bank of Chicago that said Market National Bank of Chicago had never been authorized by the Comptroller of the Currency to commence the business of banking, but nevertheless said McCormick then and there refused to accept such surrender."

As has been seen, the pleadings were sufficiently broadened by the stipulation to sustain a judgment in any form of action which the evidence agreed upon would establish. It is plain, upon principle and authority, that plaintiffs in error cannot be held upon the lease itself, as parties thereto. They are not named as parties to or otherwise in the instrument, and there are no apt words to bind them to its covenants. (*Hancock v. Yunker*, 83 Ill.,
113 208.) But counsel for defendant in error insist that under all of the facts as found, plaintiffs in error are liable as copartners in assuming to act for and on behalf of the bank as a cor-

poration when the bank had no authority to enter into the contract, and cite *Bigelow v. Gregory*, 73 Ill., 197, and *Loverin v. McLaughlin*, 161 *id.*, 417. In these cases this court held, in substance, that persons who associated themselves together by articles of agreement to become a corporation, but do not comply with the law so as to become a corporation, will be liable as partners for contracts made by them in the name assumed as the corporate name. In the *Loverin case* they were held liable under the statute of this State, and it was also there said they were liable independently of the statute. But in those cases there was a failure to incorporate, while in the case at bar the lessee, the Market national bank, was a corporation *de jure*, but was by the act by which it was incorporated incapacitated from transacting the business of banking, or entering into contracts of the character of this lease, until it had received the certificate of the comptroller, which he was not authorized to issue until certain requirements had been complied with, one of which was that one-half of the capital subscribed had been paid in. But the bank had the corporate power to transact such business and make such contracts as were "incidental and necessarily preliminary to its organization." It is not a case where the party to the contract had no corporate power, but one where its corporate power was exceeded,—a case where the contract was not *ultra vires* corporations organized under the law under which it was incorporated, but *ultra vires* this corporation, because it had failed to comply with a certain provision, without compliance with which there was a deficiency of corporate power. Here there was a *de jure* corporation, while in the cases cited there was none. We are disposed to agree with the appellate court that the principle on which individuals so associated are held as partners is not in causing the corporation to exceed its powers, but in acting for and in the name of a presumed corporation which has no corporate existence. *Trowbridge v. Scudder*, 11 Cush., 83; *First Nat. Bank v. Almy*, 117 Mass., 476; *Gent v. Manufacturers' and Merchants' Mutual Ins. Co.*, 107 Ill., 652; *Loverin v. McLaughlin*, *supra*.

114 The second proposition of defendant in error is, that plaintiffs in error, if not liable as partners, are still liable *ex contractu* upon their implied warranty of their authority to execute, or to cause to be executed on behalf of the corporation, the lease in question. The principle is one of agency, and that plaintiffs in error, as the agents of the corporation in making the contract of lease, by necessary implication asserted to the lessor that they were in fact authorized to cause the lease to be executed by the corporation. Where the contract is made in good faith and both parties are fully cognizant of the facts, and the mistake is one of law only, the result of which is to exonerate the principal from liability because the agent had no lawful authority to make the contract, it is clear that the agent cannot be held liable, either *ex contractu* or *ex delicto*. The appellate court was authorized to find, and doubtless did find, that this was not such a case. These directors were charged with knowledge that they had not taken the necessary steps to obtain, and had not obtained, the certificate of the comptroller necessary to

confer power to make the lease, and it was a fair inference for the appellate court to draw from the agreed facts that McCormick did not know of this omission until August 15, 1893,—several months after the lease was executed and after possession of the premises had been taken by the lessee under it. The stipulation also showed that the plaintiffs in error canceled their articles of association in July, but remained in possession of the premises until the 15th day of August. They had by resolution authorized and directed the execution of the lease, and there can be no doubt of the legal sufficiency of the evidence to establish an implied warranty on their part of their authority to enter into the lease on behalf of the corporation, if such implied warranty is in law a sufficient ground on which to make them liable to respond in damages to McCormick for a breach of such warranty.

It is, however, contended by the plaintiffs in error that the law is that there is no such liability *ex contractu*, and that the only remedy is by a special action on the case, and then only when there has been some deception practiced on the opposite party,—some misrepresentation to or concealment from him of some material fact,—and which deception, misrepresentation or concealment operated
115 to induce him to enter into the contract; and we are referred to *Duncan v. Niles*, 32 Ill., 532, and *Hancock v. Yunker*, 83 *id.*, 208, and the opinion of the appellate court in this case, as settling the law to that effect in this State. We do not regard the cases cited as holding that an action *ex contractu* upon the implied warranty cannot be maintained. That question was not in issue in either of the two cases cited, decided by this court. True, it was said that an action on the case for deceit would lie. In the *Duncan-Niles case* the action was brought against Niles on the note which Niles, assuming to act for the county, had given as the note of the county, and it was held that the contract was void and that neither party could be held on it, the county not having authorized it and there being no apt words in the instrument to bind Niles. It was there said, that "if the defendant falsely represented himself as the agent of the county and authorized to obtain this money, and did so obtain it, he may be reached by a special action on the case for the fraud, *or in some other appropriate action, but not on the note itself.*" And in the *Hancock-Yunker case* the action was covenant on the lease against the individual trustees who executed it on the part of the Chicago Literary Association, and it was held they were not liable on the instrument, it containing no apt words to bind them individually. Mr. Justice Scholfield, in delivering the opinion of the court, among other things said: "The question here is not whether these defendants may be held liable to the plaintiff *in a proper form of action*, but whether they are liable *in this form of action*,—*i. e.*, covenant upon the lease." True, the opinion contains the quotation in the *Duncan-Niles case* from *Abbey v. Chase*, 6 Cush., 56, that in Massachusetts the only remedy against the agent is by action on the case for falsely assuming to act as agent; but those cases cannot be treated as having decided that an action in assumpsit, not on the instrument itself but on the implied warranty of authority to execute it, cannot be maintained in this State. We are

of the opinion that upon both principle and authority such an action can be maintained. Indeed, the fraud, if any, arises out of the contractual relations which the parties have assumed. The express contract purporting to bind the principal may be void, but if the agent has given his warranty, express or implied, that he is authorized by his principal to execute the contract when he has no
116 such authority, we know of no principle of law or logic which would prevent the other party from recovering for the breach of such warranty where injury has been sustained by such breach. Why may he not waive the tort, where tort exists, and sue in assumpsit? That an action *ex contractu* on the implied warranty will lie, has been decided by many authorities. Mechem on Agency, sec. 549; 1 Am. & Eng. Ency. of Law, 2d ed., 1127; Anson on Contracts, p. 460; *Mahurin v. Harding*, 28 N. H., 128; *Collen v. Wright*, 7 E. & B., 301; *Cherry v. Colonial Bank*, L. R., 3 Privy Council App., 24; *Downman v. Williams*, 7 Q. B., 111; *Beattie v. Lord Ebury*, 7 Eng. & Irish App. H. L., 102; *Lewis v. Nicholson*, 18 A. & E., 502; Story on Agency, sec. 264; *Patterson v. Lippincott*, 47 N. J. L., 457; *White v. Madison*, 26 N. Y., 117; *Richardson v. Williamson*, L. R., 6 Q. B., 276.

Doubtless, in many cases a recovery may be had in either form of action, but in others the character of the suit must be determined by the facts of the case. Thus it is said in Mechem on Agency, sec. 549: "Much question has been raised as to the form of action in which the agent who acts without authority is to be held liable,—whether an assumpsit can be maintained or only a special action on the case. It would seem that this is a question to be determined largely by the particular facts of each case. Where an agent who knows that he has no authority makes express assertions that he possesses it, or so acts as to amount to an assertion of authority, and by so doing deceives and injures the other party who has relied thereon, it cannot be doubted that an action on the case for the deceit is an appropriate remedy. At the same time, an action of assumpsit upon the express or implied warranty of authority might also be maintained instead of the action on the case."

As the record in this case shows a clear right of action for a breach of the implied warranty of authority against the plaintiffs in error, we deem it unnecessary to decide whether or not the findings of fact by the appellate court would sustain an action on the case for deceit.

It is next contended by the plaintiffs in error that the appellate court erred in assessing more than nominal damages against them. Their contention is, that the rent stipulated in the lease cannot be regarded as the measure of damages. It is not denied, however, that it is some evidence of the damages sustained and may
117 properly be considered. The contentions of counsel in respect to the amount of damages are based upon their conclusion that the only remedy that the plaintiff below had was in an action on the case. It appears from the record that by agreement between the parties McCormick took possession of the premises in October, 1893, to rent them upon such terms as might be agreed

upon, so as to avoid as much of the loss as possible, but without prejudice to the rights of either party; that he made every effort to procure a tenant but was unable to do so. The premises stood idle during the term for which recovery was allowed by the appellate court. It was also stipulated that if the court, upon the agreed facts, should be of the opinion that the plaintiff should recover from the defendants, judgment should be entered for such sum as the court should be of the opinion the plaintiff was entitled to recover. Aside from the rent agreed to be paid in the lease, and the payment at that rate for a part of the time prior to August 15, 1893, there was no evidence of the rental value of the property or of the damages which the plaintiff below sustained. It is manifest from the stipulation that we cannot say, as a matter of law, that there was no evidence upon which the appellate court could base its findings. Indeed, counsel for plaintiffs in error, as we understand their argument, so concede if a recovery can be had in an action *ex contractu*.

Finding no error, the judgment will be affirmed.

Judgment affirmed.

118 STATE OF ILLINOIS, *ss:*

Supreme Court.

I, Christopher Mamer, elected clerk of the supreme court in and for the northern grand division of the State of Illinois and keeper of the records and seal thereof, do hereby certify that the foregoing thirteen pages *is* a true copy of the opinion of the said supreme court in the above-entitled cause of record in my office.

This copy is not to operate as a mandate in any event. Mandate will be issued only on request and payment of costs.

In testimony whereof I have set my hand and affixed the seal of the said supreme court, at Springfield, May 4, 1899.

[Seal Supreme Court of Illinois.]

C. MAMER,
Clerk of the Supreme Court.

119 At a supreme court begun and held at Springfield, on Tuesday, the fourth day of April, in the year of our Lord one thousand eight hundred and ninety-nine, within and for the State of Illinois.

Present: Joseph N. Carter, chief justice; Alfred M. Craig, justice; Jacob W. Wilkin, justice; James H. Cartwright, justice; Benjamin D. Magruder, justice; Jesse J. Phillips, justice; Carroll C. Boggs, justice; Edward C. Akin, attorney general; Charles M. Woods, sheriff.

Attest: CHRISTOPHER MAMER, *Clerk.*

Be it remembered that afterwards, to wit, on the 6th day of April, A. D. 1899, certain proceedings were had and orders entered as follows, viz:

120 ANTHONY F. SEEBERGER, WILLIAM COX, Julius S. Grinnell, Chas. H. Ferguson, Simeon H. Busey, Conway W. Hillman, Chas. G. Blanden, Chas. D. Seeberger, Arthur M. Barnhart, John Cudahy, David A. Kohn, Geo. B. Reeve, and Henry S. Boutell
vs.
LEANDER J. McCORMICK.
Error to First District.

And now, on this day, it is considered and ordered by the court that the petition for rehearing herein filed be, and the same is, stricken from the files.

121 And afterwards, to wit, on the 13th day of May, A. D. 1899, there was filed in the clerk's office of said court a certain petition and bond; which said petition and bond are in the words and figures following, viz:

Supreme Court of Illinois, February Term, A. D. 1899.

ANTHONY F. SEEBERGER, JULIUS S. GRINNELL, Simeon D. Busey, Conway H. Hillman, Charles G. Blanden, Arthur M. Barnhart, John Cudahy, Charles E. Simon, David A. Kohn, George B. Reeve, and Henry S. Boutell, Plaintiffs in Error,
v.
LEANDER J. McCORMICK, Defendant in Error.
Error to App. Ct., First District.

To the Honorable Henry B. Brown, one of justices of the
122 Supreme Court of the United States:

Your petitioners, Anthony F. Seeberger, Julius S. Grinnell Simeon D. Busey, Conway H. Hillman, Charles G. Blanden, Arthur M. Barnhart, John Cudahy, Charles E. Simon, David A. Kohn, George B. Reeve, and Henry S. Boutell, respectively represent unto your honor that a final judgment was entered in the above-entitled cause by the supreme court of the State of Illinois on or about the 18th day of February, A. D. 1899.

Your petitioners further represent that your petitioners in said cause claimed immunity from liability to the plaintiff in said cause in the trial court, being the defendant in error in said supreme court, under section 5136 of the Revised Statutes of the United States, and that a decision of the appellate court of the first district in said cause reversing the judgment and decision of the superior court of Cook county, Illinois, and entering judgment in favor of the plaintiff in said suit and against your petitioners and
123 the decision of said supreme court of Illinois affirming said judgment and decision of said appellate court were against the immunity thus claimed by your petitioners.

Wherefore your petitioners pray that a writ of error may be allowed to have said record and proceedings reviewed by the Supreme

Court of the United States, at Washington, in accordance with the statute in such case made and provided.

Respectfully submitted.

ANTHONY F. SEEBERGER,
JULIUS S. GRINNELL,
SIMEON D. BUSEY,
CONWAY H. HILLMAN,
CHARLES G. BLANDEN,
ARTHUR M. BARNHART,
JOHN CUDAHY,
CHARLES E. SIMEON,
DAVID A. KOHN,
GEORGE B. REEVE, AND
HENRY S. BOUTELL,
By HIRAM GILBERT,
Their Attorney.

E. S. BRIGHT, *Of Counsel.*

124 Upon examination of the above petition it is ordered that the prayer thereof be allowed.

BROWN,
Associate Justice of the Supreme Court of the United States.

(*Bond.*)

Know all men by these presents that we, Anthony F. Seeberger, as principal, and Hiram T. Gilbert, as surety, of the county of Cook and State of Illinois, are held and firmly bound unto Leander J. McCormick, of said county and State, in the penal sum of one thousand dollars ($1,000), lawful money of the United States; for the payment of which, well and truly to be made, we bind ourselves, our heirs, executors, administrators, and assigns, jointly and severally and firmly by these presents.

Witness our hands and seals this 10th day of May, A. D. 1899.

The condition of the above obligation is such that whereas
125 said Leander J. McCormick did, on or about the 6th day of January, A. D. 1898, recover in the appellate court of the first district of Illinois a judgment against said Anthony F. Seeberger, Julius S. Grinnell, Simeon D. Busey, Conway H. Hillman, Charles G. Blanden, Arthur M. Barnhart, John Cudahy, Charles E. Simon, David A. Kohn, George B. Reeve, and Henry S. Boutell for the sum of twenty-two thousand *tow* hundred eight dollars and thirty-three cents ($22,208.33) and costs of suit in a certain suit therein pending in said court, wherein said Leander J. McCormick was the appellant and said Anthony F. Seeberger, Julius S. Grinnell, Simeon D. Busey, Conway H. Hillman, Charles G. Blanden, Arthur M. Barnhart, John Cudahy, Charles E. Simeon, David A. Kohn, George B. Reeve, and Henry S. Boutell were the appellees, being an appeal *form* the superior court of Cook county, Illinois, to reverse

which said judgment of said appellate court of the first dis*dis-*
126 trict of Illinois the said Anthony F. Seeberger, Simeon D. Busey, Conway H. Hillman, Charles G. Blanden, Arthur M. Barnhart, John Cudahy, Charles E. Simon, David A. Kohn, George B. Reeve, and Henry S. Boutell sued out and prosecuted a writ of error from the supreme court of the State of *of* Illinois; and

Whereas the said supreme court of the State of Illinois did afterwards, on the 18th day of February, A. D. 1899, affirm the said judgment of said appellate court of the first district of Illinois, and did render judgment against the above-bounden Anthony F. Seeberger, Julius S. Grinnell, Simeon D. Busey, Conway H. Hillman, Charles G. Blanden, Arthur M. Barnhart, John Cudahy, Charles E. Simon, David A. Kohn, George B. Reeve, and Henry S. Boutell for costs of suit; and

Whereas the said Anthony F. Seeberger, Julius S. Grinnell, Simeon D. Busey, Conway H. Hillman, Charles G. Blanden, Arthur M. Barnhart, John Cudahy, Charles E. Simon, David
127 A. Kohn, George B. Reeve, and Henry S. Boutell have obtained a writ of error from the Supreme Court *og* the United States of America to said supreme court of Illinois to reverse the judgment in the aforesaid suit, and a citation directed to said Leander J. McCormick, citing and admonishing him to be and appear before said Supreme Court of the United States thirty (30) days from the date thereof:

Now, the condition of the said obligation is such that if the said Anthony F. Seeberger, Julius S. Grinnell, Simeon D. Busey, Conway H. Hillman, Charles G. Blanden, Arthur M. Barnhart, John Cudahy, Charles E. Simon, David A. Kohn, George B. Reeve, and Henry S. Boutell shall prosecute their said writ of error to effect and pay the costs to be rendered against them if they shall fail to make good their plea, then the above obligation to be void; otherwise to remain in full force and effect.

128 ANTHONY F. SEEBERGER. [SEAL.]
HIRAM GILBERT. [SEAL.]

Approved:

H. B. BROWN,
Associate Justice, Supreme Court of the United States.

This bond is satisfactory as to form and surety.

PENCE, CARPENTER & HIGH,
Attorneys for Leander J. McCormick.

129 Supreme Court of the United States, October Term, A. D. 1899.

ANTHONY F. SEEBERGER ET AL., Plaintiffs in Error, *vs.* LEANDER J. McCORMICK, Defendant in Error.	Error to Supreme Court of Illinois.

And now comes the plaintiffs in error, by Hiram T. Gilbert, their attorney, and say that in the record and proceedings of the court below in the above-entitled cause manifest error hath intervened to the prejudice of said plaintiffs in error, in this:

First. The court below erred in affirming the judgment of the appellate court of the first district of Illinois.

Second. The court below erred in not reversing the judgment of the appellate court of the first district of Illinois and in not affirming the judgment of the superior court of Cook county.

Third. The court below erred in not holding that section
130 5136 of the Revised Statutes of the United States made the defendant in error, Leander J. McCormick, chargeable with notice that the Market National Bank of Chicago had no power to enter into the lease mentioned in the record, and that such notice protected the plaintiffs in error from liability to said defendant in error.

Fourth. The court below erred in holding that, so far as the obligations of plaintiffs in error were concerned, the defendant in error was not bound to examine the records of the office of the Comptroller of the Currency to ascertain the facts touching the organization of the Market national bank, and that he was not chargeable with notice of the facts contained in or omitted from such records touching such organization, so far as the obligations of plaintiffs in error were concerned.

131 Wherefore, for these and other errors apparent in the record, the plaintiffs in error pray that the judgment of the supreme court of Illinois may be reversed, &c.

HIRAM T. GILBERT,
Attorney for Plaintiffs in Error.

Endorsed on cover: File No., 17,436. Illinois supreme court. Term No., 322. Anthony F. Seeberger, Julius S. Grinnell, Simeon D. Busey, *et al.*, plaintiffs in error, *vs.* Leander J. McCormick. Filed June 5, 1899

In the

Supreme Court of the United States.

OCTOBER TERM, A. D. 1897.

ANTHONY F. SEEBERGER et al.,
Plaintiffs in Error,
vs.
LEANDER J. McCORMICK,
Defendant in Error.

Error to the
Circuit Court
of the United States
for the Northern
District of Illinois.

BRIEF FOR PLAINTIFFS IN ERROR.

HIRAM T. GILBERT,
For Plaintiffs in Error.

Barnard & Gunn Print. Company



IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1899.

ANTHONY F. SEEBERGER ET AL., *Plaintiffs in Error,* *vs.* LEANDER J. McCORMICK, *Defendant in Error.*	Error to Supreme Court of Illinois.

BRIEF FOR PLAINTIFFS IN ERROR.

STATEMENT.

MAY IT PLEASE THE COURT:

This was an action brought by the defendant in error, McCormick, against plaintiffs in error in the Superior Court of Cook county, Illinois. A trial by jury was waived and the cause was submitted to the court upon an agreed statement of facts (Rec., 35-68), the case made by which is, in substance, as follows:

On January 31, 1893, articles of association and an organization certificate of the Market National Bank of Chicago were duly filed in the office of the comptroller of the currency. On February 9, 1893, the president and secretary of the bank, in the name of the bank, pursuant to a resolution of the board of directors, of which plaintiffs in error were members, entered into a lease with McCormick for premises to be occupied as a banking room. The banking association had not, at that time, been

authorized by the comptroller of the currency to commence the business of banking, and, in fact, never was so authorized; but subsequently, after its officers had entered into possession of the leased premises, and in the month of July, 1893, the organization was abandoned. So far as appears, no representations of any kind or character had been made to McCormick, at the time the lease was entered into, respecting the power of the bank to enter into it, unless the mere fact that the board of directors passed the resolution authorizing its execution, and the president and secretary accordingly did execute it, amounted in law to such a representation. Whether any of the plaintiffs in error, or, if so, which ones, participated in the passage of the resolution does not appear. The banking association refused to be bound by the lease on the ground that it was an *ultra vires* contract. McCormick insisted that the lease was a valid contract and binding upon the association, and brought suit against the bank to compel it to pay the stipulated rent. In that suit, which was submitted to the court upon the same agreed statement of facts as that upon which this case is submitted, the lease was held *ultra vires* and void, and a judgment was entered in favor of McCormick for $2,548.35, being the amount of rent and other charges accrued down to the time the premises were abandoned. That judgment having been affirmed by the Supreme Court of Illinois (*McCormick* v. *Market National Bank*, 162 Ill., 100), McCormick brought the case by writ of error to this court, which, in an opinion delivered by Mr. Justice Gray (*McCormick* v. *Market National Bank*, 165 U. S., 538) affirmed the judgment and held that the lease was void because, at the time it was entered into, the banking association had not been authorized by the comp-

troller of the currency to commence the business of banking, and therefore the contract was one prohibited by that portion of section 5136 of the Revised Statutes of the United States, which provides as follows:

> "But no such association shall transact any business except such as is incidental and necessarily preliminary to its organization until it has been authorized by the comptroller of the currency to commence the business of banking."

Upon the foregoing facts, the trial court, in the case at bar, found the issues in favor of plaintiffs in error, and entered judgment accordingly. Upon appeal, however, to the Appellate Court of the First District, that court (Rec., 87-88) reversed the judgment of the Superior Court and entered judgment against plaintiffs in error and in favor of McCormick for $22,208.33 and costs of suit. This judgment was, upon writ of error, affirmed by the Supreme Court of Illinois (*Seeberger* v. *McCormick,* 178 Ill., 404). To reverse the judgment of the Supreme Court of Illinois the present writ is prosecuted.

In *McCormick* v. *Market Bank,* 163 U. S., 538-551, *supra,* this court, in reference to the comptroller's examination into the condition of a national banking association and to his certificate of its authorization to commence the business of banking, speaking through Mr. Justice Gray, said:

> "The result of the comptroller's examination, and his certificate of that result, and of the authority thereupon granted the corporation to commence the business of banking, of course appear on the records of his office, as do the articles of association and the organization certificate previously transmitted to him. *Every one dealing with the corporation is bound to take notice of the facts thus appearing on a public record, upon which, by the very terms of the national bank act, depend the right of the associa-*

tion to exist as a corporation, and its capacity to transact business."

Upon the trial of this case in the Superior Court of Cook county, the defendants, in accordance with the rule of law thus laid down by this court, contended that they were protected from liability to McCormick because the Federal statute and the records of the comptroller's office were constructive notice to McCormick of the want of power on the part of the bank to enter into the lease in question, and, hence, there being no pretense of any representations made by them to him, aside from the mere fact that the president and secretary of the bank signed the lease and the board of directors authorized it, there was no ground upon which they could be held liable.

The trial court adopted this view by refusing to hold as law applicable to the case proposition number 7, offered by McCormick, which was as follows (Rec., 72):

> "7. The court holds that *so far as the obligations of these defendants are concerned, the plaintiff was not bound to examine the records of the office of the comptroller of the currency to ascertain the facts touching the organization of the Market National Bank, and that he was not chargeable with notice of the facts contained in or omitted from such record, touching such organization, so far as defendant's obligations were concerned,* and he had the right to rely upon the representations, acts and conduct of the directors and officers of such corporation, respecting its legal organization, and its right to commence a banking business, and its right to execute the lease in question, and a representation need not be expressed, but may be implied, either from acts, silence or other conduct."

In accordance with its ruling upon this proposition, it entered judgment against McCormick and in favor of the defendants. Upon the appeal of McCormick to the Ap-

pellate Court of the First District he assigned for error, by his ninth assignment of error (Rec., 82), the refusal of the trial court to hold said proposition number 7 as law applicable to the decision of the case.

Our contention is that the Appellate Court, by the reversal of the judgment of the Superior Court, and the Supreme Court of Illinois, by the affirmance of the judgment of the Appellate Court, have necessarily held that said proposition number 7 was a correct proposition of law applicable to the decision of the case, that such holding was decisive of the case, that it was erroneous, and that thereby a federal question is presented which this court has power to review.

BRIEF.

There is a federal question involved in this case.

Sec. 5136, R. S. of United States.

McCormick v. *Market Bank,* 165 U. S., 538.

Plaintiffs in error specially set up and claimed immunity by reason of Sec. 5136 of the Revised Statutes of the United States.

Armstrong v. *Treasurer, &c.,* 16 Pet., 279.

Des Moines Nav. Co. v. *Iowa Homestead Co.,* 123 U. S., 552.

The decision of the state court was against the immunity claimed by the plaintiffs in error.

The decision of the state court was decisive of the case and it was erroneous.

McCormick v. *Market Bank,* 165 U. S., 538.

I.

THERE IS A FEDERAL QUESTION INVOLVED IN THE CASE.

This case is as much dependent as to its result upon the construction and effect to be given to section 5136 of the Revised Statutes as was *McCormick* v. *Market Bank, supra.* In that case, McCormick based his right of recovery, and the bank based its claim of immunity from liability, upon section 5136. Then McCormick claimed the lease was authorized by the statute in question. Now he claims that it was not authorized and asks the court to so hold and make the defendants liable because thereof, while the defendants, admitting the lease to be prohibited by section 5136, insist that McCormick was chargeable with notice of the statute and of the records of the comptroller's office, and that this notice to McCormick protects them from liability to him. The case is one arising out of said section 5136, but for which it never would have arisen, and both parties must have the same right to the decision of this court that McCormick and the bank had in the case referred to.

That the effect to be given to a federal statute and to the acts and records of public officers in pursuance thereof is, and must necessarily be, a federal question within the jurisdiction of the federal courts to determine, cannot successfully be denied, for otherwise it would follow that the state court could nullify any federal statute by declining to give it its proper legal effect without there being any right of review by the federal courts.

To hold that the Supreme Court of the United States can declare that every one dealing with a national banking association is bound to take notice of its powers under the

Revised Statutes of the United States, and that immediately thereafter the state court can declare the contrary, without its decision being subject to review, looks to us quite absurd. If a state court has the power to finally determine that, no matter what may be the terms of an United States statute, a person dealing with a national banking association is not bound to take notice of it, it might as well be given the power of finally determining that the statute is void.

II.

IMMUNITY OF PLAINTIFFS IN ERROR FROM LIABILITY BY REASON OF A FEDERAL STATUTE WAS ESPECIALLY SET UP AND CLAIMED.

The agreed statement of facts and the stipulation connected therewith (Rec., 67) entitled either party to "establish any cause of action or any defense that they could respectively establish under any form of pleading." In other words, all questions of pleading were waived and every averment of fact in the agreed statement is to be treated as if it were averred in a plea. In pursuance of this stipulation the plaintiffs in error had the right to insist upon immunity from liability by reason of section 5136 of the Revised Statutes of the United States referred to and the records of the comptroller's office and the rule of law charging McCormick with notice thereof. The benefit of this immunity was reserved to them by the terms of the stipulation.

That the immunity we now rely upon was claimed is further established from the fact that Proposition No. 7, above referred to (Rec., 72) was submitted to the trial

court and rejected by that court as not being a correct proposition of law. If such immunity had not been claimed by the plaintiffs in error no such proposition would have been asked by McCormick nor would the trial court have refused to hold it as law applicable to the decision of the case.

It is not the law, and never has been, that for the purpose of giving this court jurisdiction there must appear in the record a statement in express terms that a right, privilege or immunity was claimed under some specified federal statute. It is sufficient if it appears from the whole record that such right, privilege or immunity was necessarily raised and involved in the case, and that the judgment of the court was of necessity a decision upon it.

Armstrong v. *Treasurer, &c.*, 16 Pet., 279.
Des Moines Nav. Co. v. *Iowa Homestead Co.*, 123 U. S., 552.

Here there was an express statement in the stipulation that at the time the lease in question was entered into the banking association had not been authorized by the comptroller of the currency to commence the business of banking. This is to be treated as an averment of a fact relied upon by plaintiffs in error as a defense to McCormick's suit. It is as clearly so as if the stipulation recited that the defendant's claimed to be protected from liability because the banking association at the time the lease in question was entered into had not been authorized by the comptroller of the currency to commence the business of banking.

It is clear, then, that this immunity was claimed by the defendants in the trial court and it is equally clear that whether such immunity existed was raised in the Appel-

late Court (Rec., 82) by the ninth assignment of error made by appellant McCormick, which was as follows:

> "The Superior Court erred in not holding as law in the decision of said cause that *so far as the obligations of said defendants are concerned the plaintiff was not bound to examine the records of the office of the comptroller of the currency to ascertain the facts touching the organization of said bank and that plaintiff was not chargeable with notice of the facts contained in or omitted from such records touching such organization so far as defendants' obligations are concerned,* and that plaintiff had the right to rely upon the representations, acts and conduct of the directors and officers of such corporation respecting its legal organization and its right to commence a banking business and its right to execute the lease in question, and the representations need not be expressed, but may be implied either from acts, silence or conduct, and it is error for said court to refuse to hold as law proposition No. 7 as tendered to the court."

As plaintiffs in error had been successful in the trial court they, of course, could not and did not, in the Apellate Court, assign any errors or in any other express manner, as far as the record shows, urge their immunity from liability by virtue of section 5136 of the Revised Statutes. That immunity had been allowed to them by the trial court, and by his assignments of error McCormick sought to have that decision of the trial court reversed. When the judgment of the trial court was reversed and a contrary judgment entered by the Appellate Court, and the case was removed by writ of error by the present plaintiffs in error to the Supreme Court, the question of their immunity from liability was raised by the assignments of error that the Appellate Court erred in not affirming and in reversing the judgment of the Superior Court. Under the practice in the Supreme Court of

Illinois no other assignments of error were necessary or allowable, but those assignments raised all the questions presented by the record.

III.

THE DECISION OF THE STATE COURT UPON THIS FEDERAL QUESTION WAS DECISIVE OF THE CASE.

It is a well settled rule of law that where the parties entering into a contract are mistaken merely as to the law and there has been no mistake of fact on the part of the complaining party, produced by the action of the opposite party, there can be no liability. In other words, if the want of authority on the part of an agent is a matter of law, the agent cannot be held liable upon an implied warranty, no misrepresentation having been made by him as to any fact. This rule is one recognized by the Supreme Court of Illinois in its opinion, where the following language is used:

> "Where the contract is made in good faith and both parties are fully cognizant of the facts, and the mistake is one of law only, the result of which is to exonerate the principal from liability, because the agent had no lawful authority to make the contract, it is clear that the agent cannot be held liable, either *ex contractu* or *ex delicto*."

If the law is as thus laid down by the Supreme Court of Illinois, its judgment cannot be sustained unless this court was wrong when speaking through Mr. Justice GRAY, in *McCormick* v. *Market Bank, supra,* it said:

> "Every one dealing with the corporation is bound to take notice of the facts thus appearing on a public record upon which, by the very terms of the national bank act, depend the right of the association to exist as a corporation and its capacity to transact business."

If McCormick was, as a matter of law, bound to take notice of the facts thus appearing upon the records of the comptroller's office, it follows, as a necessary conclusion and as a matter of law, that at the time of entering into the lease in question he was bound by law to know that it was a contract not within the power of the association to enter into. It is, therefore, clear that had the Supreme Court of Illinois held, under the agreed facts, that McCormick, at the time he entered into the lease, was bound to take notice of the want of power on the part of the corporation to enter into such a contract, it could not have decided in his favor, unless it could have held, as a matter of law, that a party entering into a contract with a corporation, with full knowledge that it was one which the corporation had no power to enter into, could hold the board of directors personally liable thereon, a proposition which no court ever has held as law and which it is plain the Supreme Court of Illinois did not intend to so hold.

It follows that the question whether, as a matter of law, McCormick, as against plaintiffs in error, was chargeable with notice that the lease was a contract which the Market National Bank had no power to enter into was decisive of the case.

IV.

THE DECISION OF THE SUPREME COURT OF ILLINOIS UPON THE FEDERAL QUESTION WAS ERRONEOUS.

That, as against the Market National Bank, McCormick was chargeable with notice of its want of power to enter into the lease was settled by this court, as we have already seen, in the suit brought by McCormick against the bank.

McCormick v. *Market Bank,* 165 U. S., 538.

To say that he was bound by such knowledge as against the bank and, under precisely the same facts, not bound as against the plaintiffs in error individually is seemingly inconsistent.

From an inspection of this record it will be seen that this is not a case where any charge can be made against plaintiffs in error, excepting that they, like McCormick, erroneously assumed the lease was a contract within the power of the banking association to enter into. The sole charge made against them is that they were members of the board of directors of the association and that the board passed a resolution authorizing the execution of the lease in the name of the bank. They in no manner solicited McCormick to make the lease, nor made any representations to him whatsoever. Indeed, this record does not show affirmatively which ones of the plaintiffs in error participated in the meeting of directors at which the resolution in question was passed, and, unless it is a necessary inference of law that every member of a board of directors of a corporation is present at every meeting and votes in favor of every resolution adopted, there is, in this record, no foundation for the judgment entered against plaintiffs in error, even if the other facts essential to their liability were established.

In considering this question it is highly important that there be no misapprehension on the part of the court as to the condition of this record, and as to the legal questions which are thereby presented. That there may be no such misapprehension we will briefly call the court's attention to the record.

The case was submitted to the trial court for trial without a jury upon an agreed statement of facts. (Rec., 35 to 68.) Upon this agreed statement of facts the trial

court entered judgment in favor of plaintiffs in error. (Rec., 32 to 34.) Before entering judgment, and for the purpose of saving to defendant in error, McCormick, the benefit of exceptions to its rulings upon questions of law, the trial court passed upon and refused to hold as law applicable to the decision of the case ten propositions (Rec., 69 to 76), among which was proposition No. 7, hereinbefore referred to.

The Appellate Court (Rec., 87 to 88) reversed the judgment of the trial court, entered judgment in favor of McCormick for $22,208.33, and made an entry in its judgment finding "the facts as set forth in the stipulation in the record." This was in pursuance of section 87 of the Illinois Practice Act, which reads as follows:

> "If any final determination of any case, as specified in the preceding sections, shall be made by the Appellate Court as the result, wholly or in part, of the finding of the facts concerning the matter in controversy, different from the finding of the court from which such cause was brought by appeal or writ of error, it shall be the duty of such Appellate Court to recite in its final order, judgment or decree, the facts as found, and the judgment of the Appellate Court shall be final and conclusive as to all matters of fact in controversy in such case."

It is self-evident that this statute was framed for the purpose of enabling the Supreme Court, upon appeal or writ of error, to determine the question, whether, as a matter of law, the facts thus found by the Appellate Court were sufficient to support its judgment, and it has been so construed repeatedly by the Supreme Court.

Brown v. *Aurora,* 109 Ill., 165.
Jones v. *Fortune,* 128 Ill., 518.
Hawk v. *C., B. & N. R. R. Co.,* 138 Ill., 37.
Siddall v. *Jansen,* 143 Ill., 537.

In the case at bar the Supreme Court, in its opinion, which, it may here be remarked, is somewhat hazy upon this point (Rec., 110), say:

> "In considering, then, the view of the case (which we are inclined to adopt), that the finding of the Appellate Court was a finding of the facts different from the facts found by the trial court, the question of law is raised by the record itself *whether or not the facts as found are legally sufficient to support the judgment.*"

This being so, the facts set forth in this stipulation must be construed as if they were embodied in a declaration or a special verdict, and if, when so regarded, they are not sufficient in law to support the judgment, the judgment must be held as erroneous.

Now, the facts set forth in the agreed statement, which forms a part of the judgment of the Appellate Court, when stripped of unnecessary verbiage, so far as they have any bearing upon the liability of plaintiffs in error, may be stated as follows:

The Market National Bank of Chicago was duly organized as a national banking association by the filing in the office of the comptroller of the currency, on the 3d day of February, 1893, of articles of association and an organization certificate, but it was never authorized by the comptroller of the currency to commence the business of banking. Plaintiffs in error were members of its board of directors. January 31, 1893, A. F. Seeberger was elected president and William Cox cashier of the Market National Bank. The board of directors passed a resolution purporting by its terms to authorize A. F. Seeberger to enter into the lease in question with McCormick, and thereupon, on February 9, 1893, the lease was entered into in the name of the bank. McCormick, at the time he

entered into the lease, understood and believed that the bank had the power to enter into the lease and had no actual knowledge or information to the contrary until the 15th day of August, 1893. The bank subsequently declined to be bound by the lease, and McCormick, having brought suit on it against the bank, recovered no rent accruing after August 15, 1893.

Upon these facts, in the absence of any representations on the part of plaintiffs in error to McCormick, their liability depends solely upon the fact that the board of directors passed a resolution authorizing the execution of the lease, and that they were members thereof, though, for aught that appears, some of them may not have been present at the meeting, or, if present, may have voted against the resolution.

The question then presented by the record is this: Is McCormick to be held chargeable with notice that the lease in question was void at the time it was entered into, in a suit brought by him against directors of the bank, who did not solicit him to enter into the lease, who made no representations, and who, in fact, were guilty of nothing except being members of the board of directors, which board passed a resolution authorizing the lease to be entered into in the bank's name?

If he was chargeable with such notice, there can be no liability on the part of defendants in error upon the theory of an implied warranty, for an *implied* warranty can never exist in favor of one who is chargeable with knowledge that the facts supposed to be warranted by the other party do not exist.

As to what the effect of section 5136 of the Revised Statutes of the United States is as notice to one dealing with a national banking association and its officers is

clearly, as we have above shown, a federal question, and as this court decided it in *McCormick* v. *The Market Bank, supra*, adversely to McCormick, we respectfully insist it must adhere to that ruling in this suit against plaintiffs in error, based, as it is, upon the same state of facts that was presented in that case.

If we are correct in this view, it follows that the state courts erred in this ruling upon proposition number 7, above referred to, and as such ruling was upon a federal question and decisive of the case, this court has jurisdiction of the case, and should reverse the judgment of the Supreme Court of Illinois.

Respectfully submitted.

HIRAM T. GILBERT,
For Plaintiffs in Error.

No. 322.

Reply Brf. of Gilbert for P. E.

Filed Oct. 13, 1899.
322.

Office Supreme Court U. S.
FILED
OCT 13 1899
JAMES H. McKENNEY,
Clerk.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1899.

ANTHONY F. SEEBERGER ET AL.,
Plaintiffs in Error,
vs.
LEANDER J. McCORMICK,
Defendant in Error.

Error to Supreme Court of Illinois.

BRIEF AND ARGUMENT IN REPLY FOR PLAINTIFFS IN ERROR.

HIRAM T. GILBERT,
FOR PLAINTIFFS IN ERROR.

BARNARD & MILLER PRINT, CHICAGO.

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1899.

ANTHONY F. SEEBERGER ET AL., *Plaintiffs in Error,* *vs.* LEANDER J. McCORMICK, *Defendant in Error.*	Error to Supreme Court of Illinois.

Brief and Argument in Reply for Plaintiffs in Error.

MAY IT PLEASE THE COURT:

We will briefly consider the positions assumed by counsel for defendant in error in their brief in support of their motion to dismiss.

I.

It is assumed that the Supreme Court of Illinois found the facts in its opinion, and that such finding must be accepted by this court as the basis of its decision. That this view is erroneous will be apparent to any one familiar with the statutes of Illinois regulating the practice in the Supreme and Appellate Courts.

Section 89 of the Illinois Practice Act (3 Starr & Curtiss, 2d Ed., page 3,136, Laws of Illinois of 1877, page 148), is as follows:

> "§ 89. The Supreme Court shall re-examine cases brought to it by appeal or writ of error *as to questions of law only*, and no assignment of error

> shall be allowed which shall call in question the determination of the inferior or Appellate Courts upon controverted questions of fact in any case excepting those enumerated in the preceding section."

The preceding section 88, thus referred to (3 Starr & Curtiss, 2d Ed., page 3,115, Laws of Illinois of 1877, page 148), so far as it is necessary to quote it, is as follows:

> "88. Appeals from and writs of error to Circuit Courts and the Superior Court of Cook County and city courts, in all criminal cases and cases in which a franchise or freehold or the validity of a statute is involved, shall be taken directly to the Supreme Court, in case the party appealing shall so elect, excepting in cases of chancery."

The case at bar, not being one of the excepted cases, the power and duty of the Supreme Court was limited strictly to the determination of the question of law whether the facts found by the Appellate Court, and embodied in its judgment, were sufficient to support that judgment. There was and could be no question of *evidence*, nor could the Supreme Court lawfully draw any conclusions from the facts recited in the judgment of the Appellate Court, excepting conclusions of law. See page 13 of our original brief and the statute and decisions there cited.

Now the Appellate Court did not find that there was any implied warranty on the part of plaintiffs in error, of power in the banking association to enter into the lease. The agreed facts adopted by the Appellate Court as its finding, are barren of any such statement. If any conclusion can be drawn from the agreed facts that there was an implied warranty, it must be drawn as a conclusion of law and not as a conclusion of fact. This court,

therefore, must consider, not what the Supreme Court of Illinois may have said in its opinion respecting questions of fact, which it had no lawful power to decide, but what its conclusion of law was upon the facts found and recited by the Appellate Court. That conclusion, briefly stated, is as follows:

Directors of a national banking association, who have consented to the execution of a lease in the name of the association before it was authorized by the comptroller of the currency to commence the business of banking, a resolution of the board of directors having been passed purporting to authorize such lease, are personally liable thereon to the lessor, as, in such case, the lessor is not bound to take notice of the facts appearing on the records of the comptroller of the currency disclosing the want of power on the part of the association to enter into the lease.

If the Supreme Court, by unlawfully assuming the power to pass upon questions of fact, can control the action of this court, it can deprive this court of its jurisdiction. Such cannot be the law. The facts in this case are, for the purposes of a review by this court, to be ascertained from the finding of the Appellate Court and that alone, and if, by the facts thus found, a federal question is presented, this court has jurisdiction.

This is quite plainly stated by the Supreme Court of Illinois itself, in its opinion (Rec., 110), when it says:

> "So treating the finding of the Appellate Court as *a finding of the ultimate facts upon which it based its judgment* of damages then recovered for the first time by the plaintiff, the *legal* question arises, independently of any propositions of law, *whether the law authorized the judgment which was rendered on such facts or not.*"

Manifestly, according to the Supreme Court of Illinois itself, its consideration of the case could involve no questions of evidence or questions of fact, nor could it make any finding of facts. Its power was limited to determining the simple question of law *whether the ultimate facts found by the Appellate Court authorized the judgment.*

It is true the Supreme Court (Rec., 114) in the passage cited by counsel for defendant in error in their brief (p. 33), say:

> "And there can be no doubt of the legal sufficiency of the evidence to establish an implied warranty of authority to enter into the lease on behalf of the corporation."

And the court also say (Rec., 114):

> " Where the contract is made in good faith and both parties are fully cognizant of the facts, and the mistake is one of law only, the result of which is to exonerate the principal from liability because the agent had no lawful authority to make the contract, it is clear that the agent cannot be held liable either *ex contractu* or *ex delicto.* The Appellate Court was authorized to find, *and doubtless did find*, that this was not such a case. These directors were charged with knowledge that they had taken the necessary steps to obtain and had not obtained the certificate of the comptroller necessary to confer power to make the lease, and *it was a fair inference for the Appellate Court to draw from the agreed facts* that McCormick did not know of this omission until August 15, 1893. "

But clearly the question is not whether the *evidence* was legally sufficient to establish an implied warranty, or whether it was a fair inference for the Appellate Court to draw from the agreed facts that Mc Cormick did not know of the omission of the comptroller's certificate, or

whether the Appellate Court was *authorized* to find any particular fact. On the contrary the question, as we have seen already from the opinion of the Supreme Court of Illinois, is what the Appellate Court *did* find and what judgment the finding *actually made* would justify.

The passage last cited from the opinion of the Supreme Court, however, conclusively shows how vital to this case is the question whether Mc Cormick was bound to take notice, as against plaintiffs in error, of section 5,136 of the revised statutes of the United States and of the records of the office of the comptroller of the currency made in pursuance thereof.

They declare:

First. That plaintiffs in error were chargeable with knowledge that they had not taken the necessary steps to obtain and had not obtained the certificate of the comptroller necessary to confer the power to make the lease.

Second. That Mc Cormick was not chargeable with such knowledge.

As a conclusion they say the mistake of Mc Cormick was not one of law but of fact, and hence he could recover against plaintiffs in error, who were bound to know the facts, he not knowing them and not being bound to know them.

Clearly, then, there is not in this case any legal finding of facts by the Supreme Court of Illinois standing in the way of a decision by this court upon the merits. The facts are to be sought in the finding of the Appellate Court, and in that alone. This is as true as if the facts, the legal effect of which was to be determined, were embodied in a declaration, a plea, or a special verdict, in

which latter cases, it would be ridiculous to suppose the Supreme Court could have any power or authority to make any finding of facts binding upon this court. This court, in such cases, would look solely to the declaration, plea or special verdict, and not to loose and u warranted remarks of the Supreme Court about *evidence.*

II.

It is contended that conceding it is a Federal question whether, as between McCormick and the banking association, the former had constructive notice of the want of power on the part of the latter to enter into the lease, it is not a Federal question, but a question of general law, as between McMormick and plaintiffs in error, whether McCormick had such constructive notice.

If this position were sound, it would follow in every case that while the construction of a statute of the United States was a question for this court to decide, the question whether a party *was bound to take notice of the statute and the proceedings under it, would be one of general law,* the decision of the State Court upon which this court could not review. This would be equivalent to holding that while this court might decide what a statute meant, it would be for the State Court alone to decide whether a party was bound by it.

The true view manifestly is, that the "Federal question," in such a case embraces not only the construction of the statute, but also its effect upon the parties in the particular case. Whether in the case at bar it affected McCormick, is clearly a Federal question.

III.

The point that the immunity claimed was not "specially set up or claimed" is discussed in our original brief (pp. 7–10). We will add a few words to what is there said:

Counsel say that "no claim was made in the trial court that a federal question of any kind was involved, nor was any made in the Appellate or Supreme Courts of the state;" "no question of the admissibility of evidence was raised," and "nothing whatever appears in the record anywhere raising or purporting to raise any federal question."

Let us briefly consider the position of plaintiffs in error in each of the state courts.

FIRST. *As to their position in the trial court, the Superior Court of Cook County.*

The fact that the association had not been authorized by the Comptroller of the Currency to commence the business of banker, is distinctly averred in the agreed statement (Rec., 53), and is thus specially set up as a ground of defense. Furthermore, paragraph 19 of the agreed statement (Rec., 65–67) recites the proceedings in the former suit, including the opinions of the Appellate and Supreme Courts of Illinois, thus showing the want of the comptroller's certificate as a ground of defense.

As already stated, plaintiffs in error, being successful in the trial court, could not show, except by implication, any claim of immunity on the part of plaintiffs in error.

The record, as made up, could only show those rulings of the trial court to which McCormick excepted. Among

the rulings, as we have already pointed out, to which McCormick excepted, was that upon Proposition No. 7, which held him bound by constructive notice of the records of the office of the comptroller of the currency. This ruling, by necessary implication, shows that the immunity from liability was especially claimed, and that it was allowed by the trial court. Why should McCormick have asked for such a ruling, if there was no claim on the part of plaintiffs in error of immunity from liability?

The fallacy of this argument of counsel for defendant in error lies in its failure to recognize that this was not a case where plaintiffs in error were beaten in the trial court, and where, by their own bill of exceptions, they could affirmatively show that immunity from liability was expressly claimed by them.

SECOND. *As to the position of plaintiffs in error in the Appellate Court.*

Plaintiffs in error, having been successful in the trial court, could assign no errors in the Appellate Court, nor could they assert their claim of immunity in any other manner than by insisting that there were no errors in the record. By his ninth assignment of error (Rec., 82), McCormick insisted that the trial court erred in not holding Proposition No. 7 was law, and consequently plaintiffs in error, *by their joinder in error*, insisted that said Proposition No. 7 was not good law, and that they were protected from liability because, as the court below had held, McCormick was bound to take notice of the records in the comptroller's office?

In what other way, or how more effectually, could plaintiffs in error have set up in the Appellate Court their claim of immunity from liability?

THIRD. *As to the position of the plaintiffs in error in the Supreme Court.*

The sole question for the consideration of the Supreme Court was, whether the facts found by the Appellate Court, and embodied in its judgment, were sufficient to support that judgment. Questions of rulings of the trial court upon the evidence were not before the Supreme Court. There was no way in which plaintiffs in error could present a federal question, or any other question, to the Supreme Court excepting by the usual and only proper asssignments of error, to wit: that the Appellate Court erred in reversing and in not affirming the judgment of the Superior Court. So, if there was a federal question in the record when the case was in the Superior and Appellate Courts, it was there when the case reached the Supreme Court and was presented to that court by the assignments of error which the Supreme Court could not decide without at the same time deciding the federal question upon which the validity of the judgment of the Appellate Court depended.

That the Supreme Court may not have expressly mentioned the federal question in its opinion is of no consequence. The opinion is no part of the record, and, in any event, it is apparent that the State Court could not defeat the jurisdiction of this court by ignoring, in its opinion, a federal question fairly presented by the record.

In *Roby* v. *Colehour*, 146 U. S., 153, this court said:

> " But although it does not appear from the opinion of the court of original jurisdiction, or the opinion of the Supreme Court of Illinois, that either court formally passed upon any question of a federal nature the necessary effect of the decree was to

> determine adversely to Roby, the rights and immunities claimed by him, in the pleadings and proofs, under the proceedings in bankruptcy to which reference has been made. * * * Our jurisdiction being invoked upon the ground that a right or immunity, specially set up and claimed under the constitution or authority of the United States, has been denied by the judgment sought to be reviewed, it must appear from the record of the case either that the right, so set up and claimed, was expressly denied, *or that such was the necessary effect in law of the judgment.*

The necessary effect in law of the judgment of the Supreme Court affirming the judgment of the Appellate Court was to concur with that court in denying the claim of plaintiffs in error to immunity from liability, and in its ruling that proposition No. 7 should have been held as law applicable to the decision of the case. If the Appellate Court, by reversing the judgment of the trial court and in entering its own judgment denied such immunity from liability, the Supreme Court by affirming that judgment likewise denied it.

Apart from these considerations, it would seem to follow as a necessary consequence that inasmuch as *McCormick* v. *Market Bank*, 165 U. S., 538, presented a federal question, the case at bar must also present a federal question.

By reference to the record (p. 66), it will be seen that paragraph 19 of the agreed statement, which paragraph contains a recital of the proceedings in *McCormick* v. *Market Bank*, expressly avers that *McCormick* v. *Market Bank* was submitted to the court upon the precise facts set forth in the preceding eighteen paragraphs. Those facts, with the rulings of the court thereon, were held by the court to present a federal question. How,

then, by the mere substitution of the names of plaintiffs in error in place of the Market National Bank, can the federal question be eliminated from the case?

IV.

Assuming the law to be, as we contend, that McCormick, as against plaintiffs in error, was chargeable with notice of section 5,136 of the Revised Statutes of the United States and of the record of the comptroller's office made in pursuance thereof, it is clear the judgments of the Appellate and Supreme Courts of Illinois cannot be sustained. The case, then, becomes clearly one in which McCormick entered into a contract which he was bound by law to know was not within the power of the Market National Bank. The law applicable to such a case is well settled.

In *Abeles* v. *Cochran*, 22 Kan., 405, a banking corporation, through its board of directors, assumed to enter into a contract for the purchase of its own stock, a transaction prohibited by law. The party with whom the contract was made, not being able to enforce the contract as against the corporation, brought suit against the directors. In deciding the case Mr. Justice BREWER, among other things, said:

> "The parties who represented the bank and made the purchase for it were the defendants. They were its directors, yet as directors they had no power to bind the bank by a purchase of its stock, and the attempted sale was a nullity, and the bank properly recovered in an action to set aside the certificates of deposit issued on such attempted purchase. Now the contentiou is, that inasmuch as the defendants attempted to bind the bank and failed, they there-

fore bound themselves; that the case comes within the rule that an agent who acts without authority binds himself and not his principal. This rule, however, is not of universal application. There are exceptions to it, and this case comes within one of those exceptions. It will be noticed that the failure of the directors to bind the bank arose from a lack of power in them as directors, and not from any failure to pass the proper resolution as a board, or to take any other prerequisite step. The law under which the corporation was organized gives no such power to directors. (*German Savings Bank* v. *Wulfekuhler*, 19 Kas., 60.) It is something the directors may not do. They cannot create the power. Their acts or omissions in no manner affect the question of its existence. And this want of power, growing out of the law, is a matter of law as open to the knowledge of the plaintiff as of the defendants. Further, there is no pretense of any false representations made by defendants, or of any concealment of facts—nothing to show any willful wrong on their part. Both parties, in fact, supposed the power existed in the directors to make the purchase, contracted upon that basis, and contracted in good faith. The power did not exist, and the bank repudiated the purchase. And the defendants can be held only upon the bare proposition that because the principal was not bound, the agent must be. But this does not necessarily follow. It is familiar law that where there is an express contract the law will not imply one. In other words, when parties have definitely put their intentions into the shape of an agreement, the law accepts that agreement as the measure of their respective rights, and will not attempt to infer the existence of some other agreement which the parties ought to have made. Here the contract as made was in the name of the bank, and for the bank. That was the express agreement. Will the law imply another? Will not the contract actually made determine the rights of the respective parties?

"Where there is no wrong imputable to the agent,

no action will be against him; not on the contract, for the contract was not his, nor for any wrong of act or omission, for he is guilty of none. * * *

"In *Sandford* v. *McArthur*, 18 B. Mon., 411, it appeared that the directors of a bank ordered the issue of notes in excess of the authority given by the law of the bank's incorporation, and they were held not personally liable, and that a person dealing with the bank was bound to take knowledge of the powers granted by law to its agents. See also, Story on Agency, Sec. 265; *McCurdy* v. *Rogers*, 21 Wis., 197; *Rashdall* v. *Ford*, 2 L. R. (Eq. Cases), 750; *Beattie* v. *Lord Edbury*, 7 L. R. (Ch. Appeals), 777.

"The doctrine of these last two cases is that a misrepresentation as to a matter of law is not such a one as will cast a personal liability on the agent, and that on the ground that each party is bound to know the law.

"It is unnecessary to pursue this examination of authorities further. The doctrine is clear that where the contract is made in the name of the principal and without any personal covenant on the part of the agent, and without any wrong on his part, either in act, statement or omission, the latter is not responsible, even though the former be not bound."

Between the case cited and the one at bar there would seem to be no difference in principle. McCormick, being bound to take notice of the statute regulating the powers of a national banking association and of the records of the office of the Comptroller of the Currency affecting those powers, is exactly in the position of the party dealing with the bank in the case cited. He made a contract which he was bound to know was invalid. This mistake was one of law, and not of fact. This, if not manifest otherwise, would be apparent from the fact that in his suit against the bank in the state court (*McCormick* v. *Market Nat'l Bank*, 162 Ill., 100), and in this court

(*McCormick* v. *Market Bank*, 165 U. S., 538), the proceedings in which are a part of the findings of the Appellate Court in this case (Rec., 67), he strenuously insisted that the lease was a contract within the power of the corporation to make, and was therefore binding upon it. Defeated in that suit, he now, after precisely the same state of facts, with equal zeal insists that he was mistaken, not as to the law, but as to the facts, and therefore is entitled to hold plaintiff in error liable.

In conclusion, we insist upon the following propositions:

First. That McCormick was, as a matter of federal law, bound to take notice of the powers of the Market National Bank, and as a matter of law knew the lease in question was *ultra vires*.

Second. That such knowledge on the part of McCormick protected plaintiffs in error from liability, because it rendered the mistake of the parties one of law only, it being essential to his recovery against them that he should be in a position to aver and maintain that he did not know and was not bound to know the lease in question was *ultra vires*.

Third. That the record in this case shows that the result depended upon the construction to be given by the court to section 5,136 of the Revised Statutes, and the duty imposed upon McCormick thereby, and that plaintiffs in error expressly claimed immunity under the statute.

Respectfully submitted.

HIRAM T. GILBERT,
For Plaintiffs in Error.



No. 322.

Brief of Pence for D. E. (mo.

Filed Oct. 4, 1899.

Supreme Court of the United States.

Office Supreme Court U. S.
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JAMES H. McKENNEY,
Clerk

322

OCTOBER TERM, A. D. 1899.

IN THE

ANTHONY F. SEEBERGER et al.,
Plaintiffs in Error,

vs.

LEANDER J. McCORMICK,
Defendant in Error.

Error to
Supreme Court
of Illinois.

MOTION TO DISMISS WRIT OF ERROR AND BRIEF FOR DEFENDANT IN ERROR.

A. M. PENCE,
GEORGE A. CARPENTER,
SHIRLEY T. HIGH,
COUNSEL FOR DEFENDANT IN ERROR.

The Stanbery-Warren Printing Company, 18 Dearborn St., Chicago.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1899.

ANTHONY F. SEEBERGER et al.,
Plaintiffs in Error,

vs.

LEANDER J. McCORMICK,
Defendant in Error.

And now comes the defendant in error, Leander J. McCormick, by his counsel, A. M. Pence, and moves the court to dismiss the above entitled cause for want of jurisdiction in the Supreme Court of the United States to review the same, in that:

1. It does not appear from the record that the questions relied upon by the plaintiffs in error to give jurisdiction to this court involve any title, right, immunity or privilege under any United States statute, nor was any such question presented to or decided by the State Supreme Court.

2. It does not appear from the record that the questions relied upon by the plaintiffs in error to give jurisdiction to this court were presented to the state courts for consideration at the proper time and in the proper manner.

3. No Federal question sufficient to give jurisdiction to this court to review the decision of the state court is involved in the cause, nor was decided by the Supreme Court of Illinois.

Respectfully submitted.

A. M. PENCE.
Counsel for Defendant in Error.

And in support of this motion we make the following suggestions:

I.

No Federal question is involved as provided in Section 709 of the Revised Statutes of the United States.

Plaintiffs in error here, who were defendants in the trial court, claim an immunity or privilege under section 5,136 of the Federal Revised Statutes relating to the organization and powers of national banks.

In 1893 plaintiffs in error with others commenced the organization of the Market National Bank of Chicago, and filed with the comptroller of the currency articles of association and an organization certificate as provided in sections 5,133, 5,134 and 5,135 of the Federal Revised Statutes, and thereupon they elected these plaintiffs in error directors thereof, who elected a president and secretary, and said president and secretary, by the direction of said board and with the knowledge and consent of all these plaintiffs in error (Rec., 41-65), in the name of said Market National Bank, entered into a lease in writing with the defendant in error of certain premises for a banking office, and took possession of the same, said lease running for a term of years. At the time of the execution of

said lease said Market National Bank was not fully organized. It had not paid up its capital stock and had not obtained the certificate of the comptroller of the currency, and was not authorized to commence a banking business as provided in section 5,136 of the United States Revised Statutes.

The bank never completed its organization but went into liquidation, and thereupon abandoned its possession of said premises and refused to perform the covenants of its lease on the ground that it never had authority to make the same.

The defendant in error, after the time for which the lease was to run had expired, brought suit to recover the rent due for the term thereof, and that case was finally brought to this court, and was decided here (see *McCormick* v. *Market National Bank*, 165 U. S., 538), this court holding that, although said bank was sufficiently organized to make contracts which were incidental and necessarily preliminary to its organization, as provided in section 5,136, that the execution of the lease in question was *incidental* to a banking business, and was not *incidental and necessarily preliminary to the organization of such bank*, and as the bank organization was not completed so as to permit it to do a banking business or matters incidental thereto, that such lease was not binding upon said bank corporation.

In the course of its decision this court said (p. 551):

> "The result of the comptroller's examination and his certificate of that result and of the authority thereupon granted the corporation to commence the business of banking of course appears upon the records of his office, as do the articles of association, and the organization certificate previously transmitted to him. *Every one dealing with the corporation is bound to take notice of the facts thus appearing upon a public record*

upon which, by the very terms of the national bank act, depend the right of the association to exist as a corporation and its capacity to transact business."

This statement of the court was based upon general principles of law, and the court properly held that defendant in error was chargeable with constructive notice of the documents filed in the comptroller's office, and of the omission to file those papers necessary to constitute its authority.

The United States statutes do not provide for such constructive notice, and this court held defendant in error to have such constructive notice, not by virtue of anything stated in any Federal statute, but upon the general principles of the law applicable everywhere and in every state, whether the question arises under the organization of a Federal corporation or of a state corporation. Without the application of such a principle corporations could be organized by individuals irrespective of any statute. Such a franchise is the gift of the supreme power of the state, and does not belong to the individual as of common right (see *California* v. *Pacific R. R. Co.*, 127 U. S., 40; *Board of Trade* v. *People*, 91 Ill., 80), and can only be obtained by complying with the statute, whether state or national, and necessarily, on general principles, every one dealing with a corporation is *chargeable* with notice of the records required to be created or furnished under the statute. This is no Federal principle, and no Federal question can or does arise by reason of the decision.

At the time of the execution of this lease McCormick believed and supposed that the Market National Bank was fully organized and had the power to do a banking business, and he relied upon the representations, con-

duct and acts of its directors and officers to that effect and that they had power to bind such corporation in the making of such lease. McCormick had no *actual* knowledge or notice of the defects in such organization. (Rec., 53.)

After the decision mentioned McCormick brought suit against such directors *for breach of an implied warranty of authority* to make such lease; and recovered judgment against plaintiffs in error upon that basis. See *Seeerger* v. *McCormick*, 178 Ill., 404; which case was brought to this court by writ of error, which we now move to dismiss.

The Supreme Court of the State of Illinois in this case said (p. 415-419):

> "The principle is one of agency, and that plaintiffs in error, as the agents of the corporation in making the contract of the lease, by necessary implication asserted to the lessor that they were in fact authorized to cause the lease to be executed by the corporation. Where the contract is made in good faith and both parties are fully cognizant of the facts, and the mistake is one of law only, the result of which is to exonorate the principal from liability, because the agent had no lawful authority to make the contract, it is clear that the agent cannot be held liable, either *ex contractu* or *ex delicto*. The Appellate Court was authorized to find, and doubtless did find, that this was not such a case. These directors were charged with knowledge that they had not taken the necessary steps to obtain, and had not obtained, the certificate of the comptroller necessary to confer power to make the lease, and it was a fair inference for the Appellate Court to draw from the agreed facts that McCormick did not know of this omission until August 15, 1893, several months after the lease was executed and after possession of the premises had been taken by the lessee under it. The stipulation also showed that the plaintiffs in error canceled their

articles of association in July, but remained in possession of the premises until the 15th day of August. They had by resolution authorized and directed the execution of the lease, and there can be no doubt of *the legal sufficiency of the evidence to establish an implied warranty on their part of their authority to enter into the lease on behalf of the corporation*, if such implied warranty is in law a sufficient ground on which to make them liable to respond in damages to McCormick for a breach of such warranty.

"* * * We are of the opinion that upon both principle and authority such an action can be maintained. Indeed, the fraud, if any, arises out of the contractual relations which the parties have assumed. The express contract purporting to bind the principal may be void, but if the agent has given his warranty, express or implied, that he is authorized by his principal to execute the contract when he has no such authority, we know of no principle in law or logic which would prevent the other party from recovering for the breach of such warranty where injury has been sustained by such breach."

The court, then quoting from Mechem on Agency, says:

"Where an agent who knows he has no authority makes express assertions that he possesses it, or so acts as to amount to an assertion of authority, and by so doing deceives and injures the other party who has relied thereon, it cannot be doubted that an action on the case for the deceit is an appropriate remedy. At the same time an action of assumpsit upon the express or implied warranty of authority might also be maintained instead of the action on the case."

"As the record in this case shows a clear right of action for a breach of the implied warranty of authority against the plaintiffs in error, we deem it unnecessary to decide whether or not the findings of fact by the Appellate Court could sustain such an action on the case for deceit."

The question of law decided by the Supreme Court of the statewas not a question depending upon any Federal

statute, but upon general law, and the finding of fact upon which such question of law depends, which was decided by the Supreme Court of the state, is conclusive upon this court. *The court found that the facts in the case constituted or was evidence of an implied warranty of authority.*

This court cannot review the facts in the case, but only questions of law, and assuming the facts in the case to be as found by the state court, then the decision of the state court turned upon a general principle of law and not upon a Federal statute.

Egan v. *Hart*, 165 U. S., 188.

In the case last cited this court said:

> "The record before us contains all the testimony introduced and evidence offered in the trial court, all of which was open for consideration and passed upon by the Supreme Court of the State of Louisiana. On error, however, to a state court, this court cannot re-examine the evidence, and when the facts are found below is concluded by such finding."

It follows, therefore, in the case at bar, that this court cannot review the evidence upon which the Supreme Court of Illinois found that there was an implied warranty of of authority on the part of the plaintiffs in error.

That court said:

> "They (the directors) had by resolution authorized and directed the execution of the lease, and there can be no doubt of the legal sufficiency of the evidence to establish an implied warranty on their part of their authority to enter into the lease on behalf of the corporation."

This finding was a finding of fact which this court cannot review even though it were of the opinion that the evidence was not sufficient to establish such an implied

warranty on the part of these plaintiffs in error, and the Supreme Court of the state found that such implied warranty was in law a sufficient ground on which to make them liable to respond in damages to McCormick for a breach of such warranty. Hence, the whole question is reduced to a question of fact or of controverted evidence and the drawing of a conclusion of fact from the evidence offered, upon which the Supreme Court of the state based its decision, can not be said to be a question of law, and such conclusion of fact cannot. therefore, be reviewed by this court.

Plaintiffs in error do not claim that they made this lease under the power conferred upon them by the National Bank Act, but allege that they had no such power, and this court decided that they had no such power. They claim, therefore, no right or immunity under this act. They are estopped by the judgment in the case of *McCormick* v. *The Market National Bank* from claiming that they had power under this act to make this lease because they asserted in that case that they had no such power. If they were disposed to set up in this case that they had such power they would be estopped from doing so, but they were not foolish enough to set up in defense of this action against them that they were empowered by the National Bank Act to make this lease. They never set up any such right, claim or immunity.

The record shows that they never have made such claim; hence there can be no Federal question involved in this case, for this court cannot review a claim made for the first time in this court that there is a Federal question when it was not made in the state court as a part of their defense.

Upon examination of the assignment of errors in this court (Rec., 129), it will be seen that they have raised no such question in this court. They do not claim any protection or refer to any power conferred under the statute, but deny their authority to execute this lease by virtue of the statute. How can it be claimed, therefore, that they set up a privilege or immunity under the statute of the United States?

II.

If it were conceded to be a Federal question as between the Market National Bank and McCormick by reason of such constructive notice to McCormick of the want of power on behalf of the bank to make the contract in question, it would not, however, be a Federal question as between plaintiffs in error—the agents of the same corporation—and McCormick. The individual liabilities of such agents of a corporation, growing out of their acts or conduct, or out of their frauds, do not depend upon any Federal statute but upon the principles of the common law.

> "The effect of constructive notice in cases where it is applicable, as in contests between *equities of innocent parties*, is sufficiently severe, and is only resorted to from the necessity of finding some ground between equities otherwise equal."

This language is used by Lord Chancellor *Cottenham* in the case of *Wo!d* v. *Gibson*, 1 House of Lords Cases, p. 622.

Plaintiffs in error were not *innocent parties*, inasmuch as they made false representations of their authority.

In the case brought to this court between *McCormick* and the *Market National Bank* there were two innocent

parties, one or the other of which must suffer by the action of the agents of such corporation, and in such case the court was entirely justified in finding that the bank would be protected, and that McCormick was chargeable with notice of the facts for the purposes of that case. Constructive notice, however, is not binding in a suit brought against the officers of a bank based upon their acts, conduct or false representations.

Weidler v. *Farmers Bank of Lancaster*, 11 S. & R., 134.
Lasher v. *Stimson*, 145 Pa. St., 30.
Clark v. *Edgar*, 84 Mo., 106.
Bigelow v. *Gregory*, 73 Ill., 197.
Cherry v. *The Colonial Bank*, L. R., 3 Privy Council App., 24.
Medill v. *Collier*, 16 Ohio St., 599.
Lagrone v. *Timmerman*, 46 S. Car., 372.
Merchants National Bank v. *Robinson*, 8 Utah, 256.
Nash v. *Minnesota Title Co.*, 159 Mass., 437.
Taylor v. *Nostrand*, 134 N. Y., 108.
Miller v. *Reynolds*, 92 Hun, 400.
Bank v. *Byers*, 139 Mo., 627.
Corwith v. *Culver*, 69 Ill., 503.
McCarthy v. *Lavasche*, 89 Ill., 270.
Casey v. *Galli*, 94 U. S., 673.
Bigelow on Estoppel (5th edit.), 462.
Hermann on Estoppel, Sec. 1250.

In *Weidler* v. *Farmers Bank of Lancaster*, *supra*, Chief Jnstice GIBSON said:

"*Constructive* notice is not *prima facie* evidence of actual knowleedge of the facts, and, therefore, con-

> structive notice is always insufficient to fix on a party actual knowledge."

It is stipulated that McCormick had no actual knowledge of the defect in the organization of this corporation (Rec., 53), and it was also found by the Supreme Court of the state that the plaintiffs in error here had knowledge that they had not taken the necessary steps to obtain, and had not obtained, the certificate of the comptroller necessary to confer power to make the lease.

In *Lasher* v. *Stimson*, 145 Pa. St., 30, a corporation was organized in New Jersey and attempted to do business in Pennsylvania without obtaining a license from the secretary of the state of Pennsylvania as required by the laws of that state. When the agent was sued upon the contract made by him in the name of the corporation, he set up as a defense that the person dealing with him was chargeable with notice that such license had not been issued, and consequently that he had knowledge of all the facts the same as the agent, but the Supreme Court of Pennsylvania said:

> "A citizen of this state who had a business transaction with another as the agent of a foreign corporation *may rely upon the representations of the agent* as to his authority without releasing him from his common law liability as principal if it turns out that his action was unauthorized. In other words, his failure to make search in the office of the secretary of the commonwealth for the statement which the corporation had to file there *will not inure to the benefit of the person who falsely pretended that he was its duly constituted agent.*"

In the case of *Clark* v. *Edgar*, 84 Mo., 106, a false representation was made by the officers of the corporation as to the charactor of a security as to whether it was a first or second mortgage, and the court there held that reliance

might be placed on the representations of the directors or officers, and that no constructive notice by the record was chargeable as would defeat a recovery against the directors.

In *Cherry* v. *The Colonial Bank*, *supra*, the law or charter provided that the officers of a certain corporation might borrow money *if authorized by a majority of the shareholders, but not otherwise.* Two of the directors in the name of the corporation borrowed money of the bank without the consent of a majority of the stockholders, and the money not being paid the bank sued the directors individually, and the court held them liable, and in doing so necessarily had to decide that the persons loaning the money to the corporation were not chargeable with notice of the want of of authority in its directors. The person or bank loaning the money could not sue the corporation because of such want of authority from the shareholders, but were chargeable with constructive notice of such want of authority so far as the corporation was concerned, but not so, as to the individual members or officers of the corporation.

In *Medill* v. *Collier*, *supra*, the officers of a bank partially organized, as in this case, and which had certain powers by virtue of such partial organization, as in the case at bar, were sued individually, and the Supreme Court of Ohio held them liable for the very reason that the bank was not liable, as the person dealing with it had *constructive notice* of such defects in its organization. The facts in that case are like those in the case at bar in all particulars. Such constructive notice when the bank is sued cannot be carried over and treated as actual notice when the officers are sued, for constructive notice necessarily implied the want of actual notice or knowledge, and if the person dealing with such officers does not have actual notice of the

fact, while the officers do have notice of it, the latter cannot claim the benefit of such constructive notice when sued individually.

In *Bigelow* v. *Gregory*, 73 Ill., 197, the court must necessarily have held and the case could not be decided without the court holding that the person dealing with the directors had a right to rely upon their representations, and that the person so dealing was not chargeable with notice of the dejects in the organization of the corporation.

In the case of *Lagrone* v. *Timmerman, supra*, the court said (p. 407):

> "This action was brought against the defendant individually, and was based upon the theory that defendants held themselves out as agents of the Farmers' Mutual Fire Insurance Association for the County of Edgefield, when in fact they had no such authority and therefore the defendants pretending to act as agents of a corporation having no legal existence as such, and no power to enter into the contract evidenced by the policy, became personally liable for the performance of such contract."

In *Merchants' Bank* v. *Robinson, supra*, a *national* bank in the course of its organization and before it was fully organized, issued certificates of stock which were sold to an innocent party. The court, in deciding the caset said:

> "A person who signs a certificate of stock of a bank represents to all the world that he is the officer he represents himself to be; *that he is authorized to issue such certificate;* that the person to whom it is issued has the interest in the bank the certificate purports to give; *that the bank is an existing institution;* that the shares of stock the certificates mention are fully paid for; that the certificate is in all things what it purports to be. *If any of these are known to be false he who signs the certificate is liable to any one who may be*

> *injured thereby.* These views are so fundamental and so consonant with honesty and fair dealing that they need no authority in their support."

In the case of *Bank* v. *Byers*, 139 Mo., 627, there was a first mortgage on record, and the officers of the bank executed a second mortgage securing certain bonds, reciting on the face of such second mortgage bonds that it was a first mortgage. The land was sold under the first mortgage for the amount due thereon, and the owners of the second mortgage bonds sued the officers upon their false representations, and the court in deciding the case said (p. 657):

> "The statement on the face of the bonds was a part thereof, and intended by defendants to be acted upon as true by all persons who purchased them, whether directly or indirectly, and any person who purchased them in good faith before maturity, relying upon the statement that they were first mortgage bonds, and who may have been injured thereby, may hold the defendants responsible for the actual damages sustained."

In the case of *Corwith* v. *Culver*, 69 Ill., 513, a party acted as president of a private corporation and held it out to the world as legally organized, which, it seems, was not the case. A creditor of the corporation brought suit against him as a stockholder under the statute, he being a subscriber to the stock of such corporation. The creditor in that case as much as here had constructive notice of the defective organization of the corporation, nevertheless the Supreme Court of Illinois held him responsible, and in the course of its opinion said:

> "It would rather appear from the evidence that the whole amount of the capital stock of the company had not been subscribed for; and it is contended that until that had been done the company could not exercise the functions of a corporation nor enter into

contracts on which an individual subscriber could be made liable. *But after the co-operation of the defendant to the extent shown, in carrying out the operations of the company, he must be held estopped from setting up such a defense.*"

There can be no distinction drawn between the liability of such an agent, whether sued upon his statutory liability or upon his common law liability based upon his false representations.

In the case of *McCarthy* v. *Lavasche*, 89 Ill., 270, it was held that the corporation was not legally organized, and that its charter was unconstitutional. The defendant was sued upon a statutory liability the same as if the corporation had been legally organized under a constitutional law and set up as a defense that the corporation was illegal and had no authority to borrow the money, and the court held the defendant responsible.

In the course of the decision the court said:

"May those who promoted the enterprise by becoming shareholders to enable the company to organize and to procure other people's money be heard to interpose such a defense? * * * Fair dealing would say that they should be estopped from interposing such a defense. * * *."

And the court also held in that case that without reference to the statutory liability that such shareholder was liable for his false representations made as to the authority of the corporation upon general principles of common law.

The court said (p. 275):

"If stockholders might show the law unconstitutional and their organization void, and all their acts unauthorized, *then all persons engaged in the organization of the corporation* should be held liable for the consequences of their illegal and unauthor-

ized acts independently of the clause in their charter. *So they should in no event escape liability for obtaining money without authority.*"

So it is clear in the State of Illinois that its Supreme Court has always laid it down as a principle of general law, that agents acting as in the case at bar were responsible upon their *implied warranty of authority*, and that a creditor or person dealing with such agents, although chargeable with notice that the corporation was illegally formed and not liable, nevertheless, that the agent of such corporation was liable upon such implied warranty of authority. This is the well established law in Illinois. In the decision of the case at bar, there being no reference to any Federal statute, or any Federal question, but the decision being made upon the plain principles of the common law, the parties cannot now import into this case a Federal question while the Supreme Court of the State was not aware that it was deciding a Federal question, and, in point of fact, no Federal question was ever raised or discussed, and no statute of the United States was ever referred to.

Mr. Bigelow, in his work on Estoppel (fifth edition), page 462, says:

> "It should be added that a third person, as *e. g.*, one assuming to act for a supposed corporation, will be estopped probably in any case to deny the truth of the representation, expressed or implied, in holding out the corporate existence of a body to an innocent person who has been induced thereby to deal upon that footing."

And Mr. Hermann, in his work on Estoppel, section 1250, lays down the same principle.

In *Casey* v. *Galli*, 94 U. S., 673, a stockholder was sued to enforce his individual liability upon the failure of a

national bank, and he set up as a defense that there was no such corporation, and that it was wholly illegal and had no power to do a banking business. The court disposed of the plea and held that such stockholder was bound by his acts and conduct.

The court said:

> "To hold otherwise would be contrary to the plainest principles of reason and of good faith, and involve a mockery of justice. Parties must take the consequences of the position they assume. They are estopped to deny the reality of the state of things which they have made appear to exist and upon which others have been led to rely. Sound ethics require that the apparent, in its effect and consequences, should be as it were real, and the law properly so regards it."

The plaintiffs in error in this case, who were directors of this bank so partially organized, knew that the capital subscribed had not been collected; they knew that the bonds required to secure their bank circulation had not been deposited; they knew that the comptroller had not issued his authority for them to commence a banking business; they knew those things, as it was their duty to perform those acts and to receive the comptroller's consent.

They stipulated that McCormick did not know these facts; they stipulated that he understood and believed that the bank was fully organized to do a banking business, and they stipulated that McCormick had no knowledge or information to the contrary (Rec., 53); they stipulated that the board of directors authorized and assented to this lease (Rec., 41); they stipulated that all such directors had full knowledge of and consented to the execution of the said lease. (Rec., 65.)

Their execution of the lease was a representation on their part that the bank was fully organized and authorized to sign the lease. There was a misrepresentation and even a fraud on the part of these directors, and consequently they cannot escape liability.

If a person represents to me that he is the agent of the owners of a certain tract of land and makes the contract with me for its sale, and it afterwards turns out that his supposed principal had never granted him authority to make such sale or did not own the property, then, if I should sue the agent upon his implied warranty of authority such agent cannot escape his liability by referring me to the records in the recorder's office where I might have ascertained who the owner was, and also have ascertained from the supposed principal that the agent had no such authority.

I would not be compelled under such circumstances to go to the supposed principal and inquire for the agent's authority. Of course, I could not hold the principal if I neglected to inquire as to such authority, but I could hold the agent responsible for the damages suffered by me. I had a right to rely upon his representations of authority.

It is clear, therefore, in this case, that, although the defendant in error might be *chargeable* with constructive notice of the want of authority of said corporation, yet such constructive notice would not relieve the agent from the effect of the representations made by him as to such authority.

Consequently it cannot be said that there is under any circumstances a Federal question involved inasmuch as the principle laid down by this court that McCormick was chargeable with constructive notice as to the defects in the

organization of the bank was the announcement of a general principle of law, and was not based upon any Federal statute, and it being admitted that Mr. McCormick in his suit against the bank was chargeable with notice it was not such notice as would follow him in his suit against the plaintiffs in error, the directors of such bank. The principle was only applicable in the first case on account of the equal equities between McCormick and the bank, but there being no equities in favor of the plaintiffs in error, on account of their false representations, he is not chargeable with such notice, and he is not chargeable upon general principles of law, or because of any Federal statute; and this court, when it held that McCormick was chargeable, as between him and the corporation, with notice of such facts as the records of the comptroller disclosed on examination, did not base its decision upon any statute, but announced a principle common to all jurisdictions. *As well contend that every principle of law announced by this court in every case is the decision of a Federal question.* The liability or want of liability of such agents does not depend upon any Federal statute. They do not claim that they made this lease under the power conferred upon them by the National Bank Act, but allege that they had no such power, and this court decided they had no such power. They claim no right of immunity under this act.

III.

Any title, right, privilege or immunity claimed under a Federal statute which the parties seek to have reviewed by this court must be "specially set up or claimed" at the proper time and in the proper way.

It must appear that the claim was made in the trial court because the Supreme Court of the state was only author-

ized to review the judgment for errors committed in the trial court, and the Supreme Court of the United States can do no more. If the right was not set up or claimed in the trial court then the judgment of the highest court of the state in the action is conclusive so far as the right of review in this court is concerned. The question whether the evidence introduced would be competent evidence cannot be reviewed unless its competency was objected to in the trial court upon the ground that it was in violation of some Federal right.

Spies v. *Illinois*, 123 U. S., 181.
Brooks v. *Missouri*, 124 U. S., 394.
Kipley v. *Illinois*, 170 U. S., 186.
Oxley Stave Co. v. *Butler County*, 166 U. S., 653.
L. N. Ry. Co. v. *Louisville*, 166 U. S., 714.
The Victory, 6 Wall., 382.
Edwards v. *Elliott*, 21 Wall., 532.
New York Life Ins. Co. v. *Hendren*, 92 U. S., 286.
Sayward v. *Denny*, 158 U. S., 180.
Winona-St. Peter L. Co. v. *Minnesota*, 159 U. S., 540.
Ansbro v. *United States*, 159 U. S., 695.
Chicago & North-Western Ry. Co. v. *Chicago*, 164 U. S., 454.
Chemical Bank v. *City Bank of Portage*, 160 U. S., 646.

Was any title, right, privilege or immunity specially set up or claimed at the proper time and in the proper way to be reviewed by this court?

No claim was made in the trial court that a Federal question of any kind was involved nor was any made in the Appellate or Supreme Courts of the state.

No question as to the admissibility of any evidence was raised on the ground of any title, right, privilege or immunity being claimed under any United States statute.

The declaration (Rec., 7) raises no question claimed by virtue of any Federal statute or against such statute. The pleas commence on record, page 27, and consist, *first*, of the general issue, and, *second*, that defendants were not jointly liable. No defense was interposed under any Federal statute. The case was submitted to the court to be tried without a jury upon stipulated facts. (Rec., 35.) No question was raised in such stipulation as to the competency of any of the facts therein stipulated nor was any question raised upon the hearing as to the admissibility in evidence of the representations, acts, and conduct of plaintiffs in error touching the execution of the lease in question, but all such representations, acts and conduct were admitted in evidence without objection.

Nothing whatever appears in the record anywhere raising or purporting to raise any Federal question or as to the right, title, privilege or immunity arising to the defendants under section 5,136 of the national banking act, or of any other section of that act. The record is absolutely silent as to the intention of the defendants to raise any Federal question in any possible way.

Under the Practice Act of Illinois, where trial is by the court, either party may "submit to the court written propositions to be held as law in the decision of the case upon which the court shall write 'refused' or 'held' as he should be of opinion is the law, or modify the same, to which either party may except as to other opinions of the court." Revised Statutes of Illinois, Chap. 110, Sec. 42, 3 Starr & Curtiss', 3033. No question of law can be raised or re-

viewed in the Supreme Ccourt of the state unless such proposition is submitted and passed upon in the trial court.

Myers v. *Union National Bank*, 128 Ill., 478.

Fitch v. *Johnson*, 104 Ill., 119.

The defendants, plaintiffs in error here, *did not ask the court to hold any propositions of law* or to determine the effect of any Federal statute. The defendant in error here, plaintiff below, requested the court to hold ten propositions of law, all of which were denied by the court and exception taken to the rulings by the defendant in error. Plaintiffs in error offered no propositions to be held as law by the trial court. (Rec., 69-76.) Judgment was entered in favor of defendant and against the plaintiff for costs. (Rec., 33.)

No exception was taken; no objection was made to any evidence upon any ground, and none was specifically made on the ground of any Federal questions being involved. The case was appealed to the Appellate Court, where the Appellate Court reversed the trial court and entered judgment in accordance with the powers conferred by the statute; no Federal question was raised or decided in the Appellate Court. Plaintiffs in error here sued out a writ of error from the Supreme Court of Illinois to the Appellate Court of Illinois.

Defendant in error here, who was appellant in the Appellate Court, assigned errors in the Appellate Court (Rec., 80), but nowhere referred to any error committed or to any ruling touching any Federal question. Plaintiffs in error here raised no question in the Appellate Court touching any Federal question.

In the Supreme Court of the state plaintiffs in error assigned errors (Rec., 91), in neither of which is there any reference to any error committed by the Appellate Court touching its decision of any Federal question.

The errors assigned by plaintiffs in error in the Supreme Court are as follows:

1. "The Appellate Court erred in not affirming the judgment of the Superior Court of Cook County.
2. "The Appellate Court erred in reversing the judgment of the Superior Court of Cook County.
3. "The Appellate Court erred in entering judgment against plaintiffs in error and in favor of defendant in error, in manner and form as the same was entered.
4. "The damages awarded by the Appellate Court to the defendant in error are excessive."

These were the only errors assigned by plaintiffs in error in the Supreme Court of the state, and it appears nowhere in the decision of the Supreme Court that any Federal question was presented to it for decision or "spe-"cially set up or claimed,"and it does not appear from its opinion that it decided or intended to decide any Federal question, but its whole decision was based upon principles of general law.

Plaintiffs in error here claim that a Federal question was raised by the proposition of law which was presented by the defendant in error here to the trial court (Rec., 72), being No. 7 of the series, which proposition, however, the trial court refused to hold as law.

It is as follows:

"The court holds that so far as the obligations of these defendants are concerned the plaintiff was not bound to examine the records of the office of the comptroller of the currency to ascertain the facts touching the organization of the Market National Bank,

> and that he was not chargeable with notice of the facts contained in or omitted from such record touching such organization so far as defendants' obligations are concerned; and he had the right to rely upon the representations, acts and conduct of the directors and officers of such corporation respecting its legal organization and its right to commence a banking business and its right to execute the lease in question, and a representation need not be expressed, but may be implied either from acts, silence or conduct."

Proposition 9 is also similar.

Plaintiffs in error here contend that although the propositions of law so tendered to the trial court were not held to be the law in the decision of the case by the trial court, yet that in some way those propositions have been held to be the law both by the Appellate and the Supreme Courts of the state. It is in and by these propositions alone that plaintiffs in error here contend that a Federal question was raised and submitted for decision. They point out no other portion of the record by which they claim any Federal question was raised. Whether the Supreme Court intended to hold that propositions 7 and 9 so tendered to the trial court were good law does not appear. It decided the case upon general principles.

But one thing is certain, that whether the Supreme Court intended to hold propositions 7 and 9 as good law or not, they did not hold anything touching any Federal question, and that nothing was said in those proposed propositions as to any Federal question arising under any federal statute.

The Supreme Court of the state has said nothing as to whether the plaintiff in this case (the defendant in error here) was charged with notice by the records in the comptroller's office. It has said nothing about constructive

notice; it has said nothing about any statute in which provision is made that such record of the comptroller's office should be notice. It has not decided that question. It did not deem it necessary to decide that question. It was nowhere presented to that court for decision. It was not raised by any assignment of error in that court, consequently it cannot be now raised.

The facts admitted in evidence by stipulation, and referred to in propositions 7 and 9 so tendered to the court, were not objected to in the trial court upon any ground, much less upon the ground that they were contrary to any Federal statute, and consequently plaintiffs in error cannot now have the question reviewed as to the admissibility of such evidence or as to its legal effect, as they did not upon the trial choose to raise the question.

In *Spies* v. *Illinois*, 123 U. S., 181, a certain letter seized in the possession of Spies was offered in evidence against him—and the Constitution of the United States probably protected him from any such use of his private papers which were so seized—but the objection that the letter was obtained from the defendant by unlawful seizure was made for the first time in the Supreme Court of the state. It was not made on the trial in the court below. This court, upon the review of the judgment of the Supreme Court of Illinois touching this question, said:

> "To give us jurisdiction under section 709 of the Revised Statutes because of the denial by a state court of any title, right, privilege or immunity claimed under the constitution, or any treaty or statute of the United States, it must appear on the record that such title, right, privilege or immunity was *'specially set up or claimed'* at the proper time in the proper way. To be reviewable here the decision must be against the right so set up or claimed. As the Supreme Court of the state was reviewing the decision of the trial court,

> it must appear that the claim was made in that court, because the Supreme Court was only authorized to review the judgment for errors committed there, *and we can do no more.* * * * If the right was not set up or claimed in the proper court below, the judgment of the highest court of the state in the action is conclusive, so far as the right of review here is concerned. The question whether the letter, if obtained in the manner alleged, would have been competent evidence, is not before us, and, therefore, no foundation is laid under this objection for the exercise of our jurisdiction."

In the case at bar, no right, privilege or immunity was set up or claimed in the trial court or in the Supreme Court of the state, or anywhere else, growing out of any Federal statute, and hence under this decision none can now be raised.

In *Brooks* v. *Missouri, supra*, the Spies case was referred to and quoted from as part of the opinion in that case, and after quoting as above, this court said (p. 395):

> "Applying that rule (in the Spies case) to this case, we find that at the trial no title, right, privilege or immunity was specially set up or claimed under the constitution, laws or treaties of the United States. Thus, when the testimony of McCullough was offered, the admission of which is now assigned for error, the objection made was not that its admission would be a violation of any provision of the Constitution or laws of the United States, *but because it was 'incompetent and irrelevant.'* * * *
>
> "And so in respect to the ruling on the motion to quash the indictment, and to discharge the defendant from arrest, the only objection was 'that said indictment, proceedings, imprisonment, and restraint are illegal and unlawful, and in violation of the Constitution and laws of the State of Missouri, and without any due process of law or lawful authority whatsoever.' The particular provisions of the Constitution of the state now relied upon in support of this assign-

ment or error are section 11 of the bill of rights, to the effect that 'no warrant to seize any person shall issue without probable cause, supported by oath or affirmation reduced to writing,' and section 12, 'that no person shall, for a felony, be proceeded against criminally, otherwise than by indictment.' "

Then, after reciting several other assignments of error, this court says;

"These are all the assignments of error which relate to the rulings in the progress of the trial, and they fail entirely to present any questions of Federal law for our consideration. So far as appears, the trial court in its decisions was governed exclusively by the Constitution and laws of the state, and the Supreme Court in its opinion on this part of the case, which is in the record, *makes no mention whatever of any claim of right under the Contsitution or laws of the United States.*"

The same can be said in this case, that neither in the trial nor the Appellate nor the Supreme Court of the state does it appear that any claim whatever of rights under the Constitution or laws of the United States was made.

In *Oxley Stave Co.* v. *Butler County*, 166 U. S., 648, which was a civil suit, the case was brought up by a writ of error to the state Supreme Court under section 709 of the Revised Statutes, and this court said:

"But it cannot review such final judgment, *even if it deny some title, right, privilege or immunity of the unsuccessful party*, unless it appear from the record that such title, right, privilege or immunity was *'specially set up or claimed'* in the state court as beloging to such party, under the Constitution or some treaty, statute, commission or authority of the United States.

"*Looking into the record we do not find that any reference was made in the court of original jurisdiction to the Constitution of the United States.* Nor can it be inferred from the opinion of the Supreme Court of

Missiouri that that court was informed by the contention of the parties that any Federal right, privilege or immunity was intended to be asserted. *For aught that appears the state court proceeded in its determination of the cause without any thought that it was expected to decide a Federal question.*"

The court further said:

"Do such general allegations meet the statutory requirement that the final judgment of a state court may be re-examined here if it denies some title, right privilege or immunity 'specially set up or claimed' under the Constitution or authority of the United States? We think not. The specific contention now is that the decree of the Butler County Circuit Court in the suit instituted by the County of Butler was not consistent with the due process of law required by the fourteenth amendment of the Constitution of the United States. But can it be said that the plaintiffs *specially* set up or claimed protection of that amendment against the operation of that decree by simply averring—*without referring to the Constitution or even adopting its phraseology*—that the decree was passed against deceased persons as well as in the absence of necessary or indispensable parties?

"This question must receive a negative answer, if due effect be given to the words 'specially set up or claimed' in section 709 of the Revised Statutes. * * * The words 'specially set up or claimed' imply that if a party intends to invoke for the protection of his rights the Constitution of the United States or some treaty, *statute*, commission or authority of the United States, *he must so declare;* and unless he does so declare *'specially'—that is, unmistakably—this court is without authority to re-examine the final judgment of the state court.* This statutory requirement is not met if such declaration is so general in its character that the purpose of the party to assert a Federal right is left to mere inference. It is the settled doctrine of this court that the jurisdiction of the Circuit Court of the United States must appear affirmatively from the record, and that it is not sufficient that it may be in-

ferred argumentatively from the facts stated. Hence the averment that a party resides in a particular state does not import that he is a citizen of that state. (Citing cases.) Upon like grounds the jurisdiction of this court to re-examine the final judgment of a state court cannot arise from mere inference, *but only from averments so distinct and positive as to place it beyond question that the party bringing a case here from such court intended to assert a Federal right.*

After reviewing the authorities, the court states:

"Without further reference to the adjudged cases, we are of opinion that the general allegation or claim, in different forms, that the decree of the Butler County Circuit Court was passed against some persons who were dead, and against others who were necessary parties, but who had no notice of the proceedings, does not, within the meaning of section 709 of the Revised Statutes, specially set up a right or immunity under the Fourteenth Amendment of the Constitution of the United States, forbidding a state to deprive any person of his property without due process of law. If it appeared that the Supreme Court of the state regarded these general allegations as asserting such Federal right or immunity, and denied the claim so asserted, our jurisdiction could be sustained. But it does not so appear."

In *Sayward* v. *Denny*, 158 U. S., 180, the chief justice again reviewed this proposition, and concluded thus:

"We are not called upon to revise these views *of the principles of general law* considered applicable to the case in hand. It is enough that there is nothing in the record to indicate that the *state courts were led to suppose that plaintiff in error claimed protection under the Constitution of the United States from the several rulings*, or to suspect that each ruling as made involved a decision against a right specially set up under that instrument, and we may add *that the decisions of state tribunals in respect of matters of general law cannot be reviewed on the* theory that the law of the land is violated unless their conclusions are absolutely free from error."

In *Ansbro* v. *United States*, 159 U. S., 695, this court said:

> "But we cannot find that any constitutional question was raised in the trial. Motions to quash, to instruct the jury to find for the defendant, for new trial, and in arrest of judgment were made, but in neither of them, so far as appears, nor *by any exception to rulings on the admission or exclusion of evidence*, nor to instruction given or the refusal of instructions asked, was any suggestion made that defendant was being denied any constitutional right or that the law under which he was indicted was unconstitutional. The first time that anything appears on that subject is in the assignment of errors, filed February 13, 1895.
>
> "A case may be said to involve the construction or application of the Constitution of the United States when a title, right, privilege or immunity is claimed under that instrument, but a definite issue in respect of the possession of the right must be distinctly deducible from the record before the judgment of the court below can be revised on the ground of error in the disposal of such a claim by its decision. And it is only when the constitutionality of a law of the United States is drawn in question, not incidentally but necessarily and directly, that our jurisdiction can be invoked for that reason. (Citing cases.) An assignment of errors cannot be availed of to import questions into a cause which the record does not show were raised in the court below and rulings asked thereon, so as to give jurisdiction to this court under the fifth section of the act of March 3, 1891."

In *Kipley* v. *Illinois*, 170 U. S., 182, it was sought to review the decision of the Supreme Court of the state by claiming some title. right, privilege or immunity under the constitution and laws of the United States. It was an original proceeding in the state court by way of mandamus. This court in its opinion points out the defects. The court says:

"We are of opinion that this court is without jurisdiction to review the final judgment of the Supreme Court of Illinois in these cases. The answer makes no reference whatever to the Constitution or laws of the United States. It is true that it avers that the Illinois Civil Service Act was *'unconstitutional and void.'* But when the jurisdiction of this court is invoked for the protection, against the final judgment of the highest court of a state, of some title, right, privilege or immunity secured by the Constitution, or laws of the United States, it must appear expressly or by necessary intendment, from the record, that such right, title, privilege or immunity was 'specially set up or claimed' under such constitution or laws. (Rev. Stat., 709.) Our jurisdiction connot arise in such case from inference, but only from averments so distinct and positive as to place it beyond question that the party bringing the case up intended to assert a Federal right. * * * It is manifest that when the answer was drawn, neither the defendant Kipley nor the learned counsel representing him intended to raise any question of a Federal nature. We cannot suppose that it occurred to either of them at that time that the Civil Service Act of Illinois was repugnant to the Constitution of the United States.

"* * * It may be observed that the opinion of the state court delivered upon final hearing contains nothing to show that any Federal question was considered or determined."

We wish only to add that a similar question was attempted to be raised here by the same attorney, who is counsel in this case, in *Chemical Bank* v. *City Bank of Portage*, 160 U. S., 646, and this court refused jurisdiction.

In that case the cause was tried without a jury and propositions of law were submitted. This court said:

"The Appellate Court reviewed the judgment of the Superior Court for errors committed on the trial,

and, finding none, affirmed it, and the Supreme Court affirmed the judgment of the Appellate Court; and if no such claims were set up in the trial court the Supreme Court in approving the affirmance of its judgment by the Appellate Court could not be held to have decided against a claim with which the trial court had not been called upon to deal. It does not appear that the immunity from liability was expressly claimed by plaintiff in error in the trial court on the ground that the bank could retain the money, because it was obtained by means in excess of the powers of its cashier or other officers.

"The propositions on which the trial court was asked to rule were manifestly directed to the right of recovery on the note as such, under the special count, and certainly fell far short of a claim of the character suggested as a defense to a recovery under the common counts. *Moreover, the question of liability, whatever the authority of these bank officers to borrow this money for the bank, depended upon general principles of law applicable under the particular facts.*"

We need quote from no further cases upon this proposition. It is plain in this case that no Federal question was ever specially set up or claimed in the courts below by the plaintiffs in error; nor was any Federal question decided or considered by the Supreme Court of the state.

IV.

The Merits of the Case.

If this court should decide that it has jurisdiction then it must also determine whether the supposed Federal question was properly decided by the Supreme Court of Illinois.

If properly decided then no other question will be determined, and this court will affirm such judgment, though it should be of the opinion that other legal questions in the case were improperly decided.

If the court should be of the opinion that such supposed Federal question was improperly decided by the state court, yet, if there be other matters upon which the judgment can be sustained, notwithstanding such error in the decision of the Federal question, the judgment will be affirmed.

Murdock v. *City of Memphis*, 20 Wall., 590.
Missouri Pacific Ry. Co. v. *Fitzgerald*, 160 U. S., 576.

The question in the case claimed to be Federal in its character was properly decided. No argument can make it any more clear than the bare reading of the opinion of the Supreme Court of Illinois.

The authorities under point II of this brief may be examined upon this proposition if the court has any doubt.

Aside from the supposed Federal question there is sufficient in the record to show that the judgment can be sustained without a reference to such Federal question.

The court will not look at the evidence or re-examine same. The facts being found by the Supreme Court of the state, this court is concluded thereby.

Egan v. *Hart*, 165 U. S., 188.

The Supreme Court of the state said (*Seeberger* v. *McCormick*, 178 Ill., 416):

> *"And there can be no doubt of the legal sufficiency of the evidence to establish an implied warranty of authority to enter into the lease on behalf of the corporation."*

This court cannot re-examine the evidence or any portion thereof for the purpose of ascertaining whether the state Supreme Court erred in such finding of facts. It can only re-examine the questions of law applicable to such a state-

ment of facts. The right to recover upon such contract and upon such a statement of facts is a question of general law which this court cannot review as it does not involve a Federal question, and is also sufficient to sustain the judgment aside from any supposed Federal question.

This court, in *Egan* v. *Hart, supra*, said:

> "The record before us contains all the testimony introduced and evidence offered in the trial court, all of which was open for consideration and passed upon by the Supreme Court of the State of Louisiana. On error, however, to a state court this court cannot reexamine the evidence, and when the facts are found below is concluded by such finding."

If this court has jurisdiction to entertain this writ of error it should then affirm the judgment with ten per cent. damages under the rule of this court.

Respectfully submitted.

A. M. PENCE,
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SHIRLEY T. HIGH,
Counsel for Defendant in Error.

SEEBERGER *v.* McCORMICK.

ERROR TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

No. 322. Submitted October 16, 1899. — Decided December 4, 1899.

The contention, even if formally made, that plaintiffs in error were seeking to avail themselves of some right or immunity under the Constitution or laws of the United States, does not give this court jurisdiction to review the judgment of the Supreme Court of a State, where that judgment was based upon a doctrine of general law, sufficient of itself to determine the case.

It having been decided in *McCormick* v. *Market Bank*, 165 U. S. 538, that the contract of lease there in suit was void, the plaintiff in error in that case commenced this action in a state court in Illinois to recover from citizens of that State the rent for the property which had been intended to be leased to the bank by the void lease, on the ground that they had

Statement of the Case.

falsely assumed corporate authority to make the void lease. Such proceedings were had in the state courts that judgment was finally rendered by the Supreme Court of that State in McCormick's favor. *Held*, that the question whether the plaintiffs in error rendered themselves liable to McCormick by reason of their false assumption of corporate authority was one of general law, and not one to be solved by reference to any law, statutory or constitutional, of the United States; and that, as no Federal question was in form presented to or passed upon by the state Supreme Court, and because its judgment was based upon matter of general and not Federal law, this court was without jurisdiction to review it.

THIS was an action brought in a state court of Illinois in which Leonard J. McCormick sought to hold Seeberger and others as partners for an alleged false assumption of power as a national banking association.

On January 31, 1893, articles of association were signed and an organization certificate was signed and acknowledged by nine citizens of Illinois, and both were transmitted to the Comptroller of Currency, as required by the Revised Statutes of the United States, for the purpose of making them a national banking association at Chicago by the name of the Market National Bank. At a meeting of the directors of the bank, chosen by the stockholders, and named in the articles of association, a president and cashier were duly elected, and the directors caused a seal to be made for the bank. On February 9, 1893, the president, pursuant to a resolution of the directors, signed and sealed with the corporate seal a lease in writing from Leander J. McCormick to the bank of certain offices in Chicago, "to be used and occupied by said Market National Bank as a banking office, and for no other purpose," for the term of five years from May 1, 1893, at a yearly rent of $13,000. By an agreement made part of the lease, McCormick was to make certain alterations and repairs at his own expense; either party might cancel the lease on May 1 of any year by giving ninety days' notice in writing; and no rent was to be charged until the bank took possession. On April 12, 1893, the parties made a supplemental agreement, by which McCormick was to make further alterations, the bank paying half the cost thereof. All the alterations and repairs were made by McCormick as agreed; the cost, paid by him, of the

alterations of April 12, 1893, being $2475. On June 22, 1893, the president and cashier, in the name of the bank, took possession of the demised premises, and put in the fixtures and furniture, blank books and stationery, necessary to carry on a banking business, and they were not removed until April 30, 1895.

Of the whole capital stock of $1,000,000, called for in the articles of association, but $331,594 was ever paid in; and the bank was never authorized by the Comptroller of the Currency to commence, and never did commence, the business of banking. The officers of the bank, from time to time, corresponded with McCormick, using letter heads, with the name, location and place of business of the bank and the names of the officers printed thereon, and signing in their official capacity. On August 15, 1893, the officers of the bank informed McCormick that the bank had never been authorized to commence the business of banking, and had no power to enter into the lease, and had abandoned all further proceedings, and offered to surrender the lease. McCormick refused to accept the surrender, and on September 20, 1893, the president caused the key of the office to be left on the desk of McCormick's agent, he refusing to accept it.

On October 4, 1893, the parties agreed in writing that, without prejudice to the rights of either, McCormick should take possession of the premises, and endeavor to lease them and to collect the rent thereof. He made every effort to obtain a tenant accordingly, but was unable to do so. On January 3, 1895, McCormick gave written notice to the president of the bank of his intention to terminate the lease in May, 1895, in accordance with its terms. The cashier paid the rent, according to the lease, until July 22, 1893; but the bank refused to pay any rent subsequently accruing, and never paid its half of the cost of the alterations made under the agreement of April 12, 1893. Thereupon McCormick brought an action against the Market National Bank on July 17, 1895, in the Superior Court of Cook County, Illinois, claiming that he was entitled to recover judgment, at the rate agreed upon in the lease, from July 22, 1893, up to May 1, 1895, and for half of the

cost of changing and repairing the premises. That court refused to hold that McCormick could recover upon the lease as a valid contract, but gave judgment in his favor for the rent from July 22 to August 15, 1893, and for half the cost of the alterations, with interest, amounting in all to the sum of $2548.85. This judgment was affirmed on successive appeals of McCormick, by the Appellate Court and by the Supreme Court of Illinois. 61 Ill. App. 33; 162 Illinois, 100. Thereupon McCormick sued out a writ of error and brought the case to the Supreme Court of the United States, where the judgment of the Illinois courts was affirmed. 165 U. S. 538.

On November 19, 1895, McCormick brought an action in the Superior Court of Cook County, Illinois, against Anthony F. Seeberger and fifteen persons, as copartners doing business in Chicago, Illinois, under the firm name and style of The Market National Bank of Chicago. The defendants were officers, directors and shareholders of the Market National Bank, and in this action McCormick sought to hold them personally for the balance of the rent due under the terms of the lease. The Superior Court rendered judgment for the defendants. McCormick appealed, and the Appellate Court of Illinois reversed the judgment, "found the facts as set forth in the stipulation in the record," and entered judgment against the defendants, and assessed the damages at the amount of the rent stipulated in the lease from August 15, 1893, to May 1, 1895, to wit, $22,208.33. The defendants then took the case to the Supreme Court of Illinois, which affirmed the judgment of the Appellate Court. Thereupon the defendants sued out a writ of error and brought the case to this court; and on October 16, 1899, a motion was made and submitted by the defendant in error to dismiss the writ of error on the alleged ground that no Federal question, sufficient to give this court jurisdiction to review the decision of the state court, was shown by the record.

Mr. Hiram T. Gilbert for plaintiff in error.

Mr. A. M. Pence, Mr. George A. Carpenter and *Mr. Shirley T. High* for defendant in error.

Opinion of the Court.

MR. JUSTICE SHIRAS, after making the above statement of the case, delivered the opinion of the court.

In the suit brought by McCormick against the Market National Bank of Chicago it was held by the Supreme Court of Illinois that the contract of lease sued on was not incidental and necessarily preliminary to the organization of the corporation, and therefore, by virtue of section 5136 of the Revised Statutes, having been executed by the defendant before being authorized by the Comptroller of the Currency to commence the business of banking, did not bind the defendant. That decision being arrived at upon a consideration of the legal import of a statute of the United States, was plainly one involving a Federal question. But it was contended that this court had no jurisdiction to review the action of the state court, because its decision was in favor, in respect to the Federal statute, of the party who had set up and claimed an immunity under it. It was, however, clearly shown by this court that, as the defendants had relied on the statutory prohibition to transact any business until it had been authorized by the Comptroller of the Currency to commence the business of banking, and as the plaintiff had relied on the exception out of that prohibition, that is, had claimed that the lease was "incidental and necessarily preliminary to the organization," and as the decision was against the plaintiff on the latter contention, it was, therefore, a decision against a right claimed by him under a statute of the United States and reviewable by this court on writ of error. *McCormick* v. *Market Bank*, 165 U. S. 538, 546.

McCormick's recovery in that action having been restricted to rent for the time of the bank's actual occupancy of the premises, he brought the present suit against the persons who had taken part in the proposed organization of the bank, charging them as partners doing business in the firm name and style of the Market National Bank of Chicago. He recovered a judgment in the Appellate Court of Illinois. That judgment has been affirmed by the Supreme Court of Illinois, and the case is now before us on a writ of error to the judgment of the state Supreme Court.

Opinion of the Court.

The theory upon which this action was maintained in the state courts can be best made to appear by a quotation from the opinion of the Supreme Court:

"The principle is one of agency, and that plaintiffs in error, as the agents of the corporation in making the contract of the lease, by necessary implication asserted to the lessor that they were in fact authorized to cause the lease to be executed by the corporation. Where the contract is made in good faith and both parties are fully cognizant of the facts, and the mistake is one of law only, the result of which is to exonerate the principal from liability, because the agent had no lawful authority to make the contract, it is clear that the agent cannot be held liable, either *ex contractu* or *ex delicto*.

"The Appellate Court was authorized to find, and doubtless did find, that this was not such a case. These directors were charged with knowledge that they had not taken the necessary steps to obtain, and had not obtained, the certificate of the Comptroller necessary to confer power to make the lease, and it was a fair inference for the Appellate Court to draw from the agreed facts that McCormick did not know of this omission until August 15, 1893, several months after the lease was executed and after possession of the premises had been taken by the lessee under it. The stipulation also showed that the plaintiffs in error cancelled their articles of association in July, but remained in possession of the premises until the 15th day of August. They had by resolution authorized and directed the execution of the lease, and there can be no doubt of the legal sufficiency of the evidence to establish an implied warranty on their part of their authority to enter into the lease on behalf of the corporation, if such implied warranty is in law a sufficient ground on which to make them liable to respond in damages to McCormick for a breach of such warranty. . . .

"We are of opinion that upon both principle and authority such an action can be maintained. Indeed, the fraud, if any, arises out of the contractual relations which the parties have assumed. The express contract purporting to bind the principal may be void, but if the agent has given his warranty,

express or implied, that he is authorized by his principal to execute that contract when he has no such authority, we know of no principle in law or logic which would prevent the other party from recovering for the breach of such warranty where injury has been sustained by such breach."

Did such a state of facts and law present a Federal question? Certainly there was no formal allegation in the assignments of error to the judgment of the appellate court that the plaintiffs in error were claiming any immunity under the laws or Constitution of the United States; nor is there any allusion, however distant, in the opinion of the Supreme Court, to any such question. And surely the fact that the defendants had proposed, but had failed, to effect an organization as a banking association under the laws of the United States, did not bestow a Federal character upon their transactions. By withdrawing from their futile attempt to create a corporation under the statutes of the United States, these individual defendants must be deemed to have renounced any right, title or immunity they might have possessed under such organization had it been perfected.

It has been frequently held that the contention, even if formally made, that plaintiffs in error were seeking to avail themselves of some right or immunity under the Constitution or laws of the United States does not give us jurisdiction to review the judgment of the Supreme Court of a State where that judgment was based upon a doctrine of general law sufficient of itself to determine the case. *Beaupré* v. *Noyes*, 138 U. S. 397; *Eustis* v. *Bolles*, 150 U. S. 361; *Pierce* v. *Somerset Railway*, 171 U. S. 641; *Remington Paper Co.* v. *Watson*, 173 U. S. 443.

We think that the question whether the plaintiffs in error rendered themselves liable to McCormick by reason of their false assumption of corporate authority was one of general law, and not one to be solved by reference to any law, statutory or constitutional, of the United States.

As well, then, because no Federal question was in form presented to or passed upon by the Supreme Court of Illinois, as because the judgment of that court was based upon matter of general and not Federal law, we are unable to see that we have